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ABSTRACT

The report presents a collection of articles on constitutional issues from a 1976 social studies conference. It is intended to be used by teachers in planning and implementing curriculum materials on development of the U.S. Constitution. The booklet is divided into eight articles. The first article discusses interpretive problems in the formation of the constitution and gives examples of how historiographic issues can be effectively used in the teaching of history. The second article explores ways of teaching and understanding legal terms, reasoning, analysis, and rules. In the third article, the English roots of American constitutionalism are explored, followed by discussion of women's rights under the constitution in the fourth article. Urban problems before the courts, and, particularly, ways in which social studies teachers can draw themes from court action are discussed in the fifth article. The sixth article presents a history of the Supreme Court's handling of cases related to education, followed by a report of recent trends of freedom of expression in American constitutional law in the seventh article. The final article compares myths, opinions, and facts of the U.S. Constitution with those of the constitution of the Union of Soviet Socialist Republics. (Author/DB)

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THE U.S. CONSTITUTION
AND
ITS DEVELOPMENT

A Conference held at Yale University, May 7, 1976

Sponsored by the Connecticut Council for the Social Studies
the Department of History at Yale, the Yale Law School,
the Yale Council on Russian and East European Studies,
and the Yale-New Haven History Education Project
in co-operation with
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SO 009 870

Preface

The Connecticut Council for the Social Studies is proud to present this collection of talks from its 1976 Yale Conference. The general theme of the program dealt with Constitutional issues in a historic and contemporary context.

In presenting this transcript we would like to express our appreciation to Yale University, the Council on Russian and East European Studies and the Connecticut Department of Education for their co-operative efforts which served to make this conference the success that it was.

This booklet represents the constructive kinds of programs that can be made available to social studies teachers when interested organizations pool their resources. It is our hope that increased efforts in the future will result in an expanded number of programs which will serve the interests of social studies teachers in the region.

For its part the Connecticut Council for the Social Studies is re-structuring its organization so as to be more effective in providing localized programs to meet teachers' needs. The basic premise behind our re-organization is the idea that individual teachers best know what types of programs will be of interest to themselves. Therefore, we are in the process of developing regional councils which will be open to any social studies teachers in a particular area who are interested in taking an active part in developing and implementing programs within their corner of the state.

As teachers throughout the state become aware of these new programs, we hope that they will be motivated to become involved, not just as participants, but as planners!

Bob Asman
Past President
Connecticut Council
for the Social Studies

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The Formation of the United States Constitution:
Problems in Interpretation

Barbara A. Black

If you feel that in the course of teaching history one should, along the way, pay some attention to historiographic issues, then I suggest to you that the formation of the U.S. Constitution is a fine topic for this purpose. As a focus for discussion of the problems of understanding, interpreting and writing history it can hardly be matched, and it is in those terms that I propose to discuss it today.

This means, of course, that we might as well have called this talk "Charles Beard and the Constitution," in recognition of the fact of Beardian domination of this subject. The man is for all the world like those inflated plastic figures whose function it is to be knocked down so they may bounce back up. I do not suppose Charles Beard deliberately cast himself in this role but others have done it for him. And however often he is, allegedly, knocked down, back he bounces to confront us with his presence.

We shall be concerned with problems of interpretation -- and these (like juries) come on the grand and petit scale. And in this context, as with the jury, petit does not mean trivial -- that indeed may be the very reverse of the truth, as any defendant could tell us.

As an example of an interpretive problem on the grand scale, we have, first, this one: do we believe that men act in accordance with principle, or only "interest" which we tend to equate with cold cash? Are we disposed to be skeptical of the picture of the founding fathers as a band of demi-gods striking off, at a stroke, a document perfectly calculated to ensure the blessings of liberty to themselves and their posterity? Do we look hard at the financial records of these demi-gods, knowing full well that they "really" meant to strike off a document which would ensure a rising market value for the property of themselves and their posterity? Or do we believe in the principle which, as it has been put, will not fit into the pocketbook?

Always we must suspect that there is no avoiding one's personal inclinations in this respect; in the end, those of us who write and teach history, are, in common with those who make it, limited by what we are -- we have temperaments, characters, experiences, needs, which may well lead us to one side or another of this grand-scale and divisive issue, however much we struggle for objectivity. So George Bancroft knew the framers of the Constitution to be men above men -- giants moved by all that stamps the hero; to Charles Beard, they were hard-headed representatives of an economic class out to make those political arrangements which would benefit that class in a most concrete way. Both sides see the founding fathers as speculative -- but to one side they appear in the robes of the philosopher, and their speculations center on such lofty matters as liberty; to the other, there appears nothing airy about the speculations of the founding fathers -- with both feet on the ground, and an occasional hand in the till, they speculated not on, but in -- and usually in continental securities.

Beard's specific thesis was that the class that did the deed were the owners of substantial personal property -- and in particular, the holders of public securities, who needed a strong central government to prop up their holdings. The reaction to Beard, over the many decades, has been spectacular -- he has been accused of just about everything; deliberately distortive selection of evidence is the least of it. One suspects that more than scholarly passions were raised; nevertheless, from the criticism much may be learned, and taught.

That Beard's evidence was inadequate is clear. Indeed he himself called it frankly fragmentary. And the problem that can fruitfully be discussed with students is whether one ought to write a book on frankly fragmentary evidence, telling the world that enormously more work must be done before the hypotheses one sets forth can be validated. Opinions may differ on this, but as a case in point this experience suggests that it is not altogether a good idea, for what happened (among other things) was that the tentative nature of the conclusions was more or less forgotten. Other scholars were not so cautious as Beard. His hypothesis became a thesis, and in turn it was assumed to be a validated thesis. Moreover -- and very naturally given the outrageous and influential quality of the book -- scholars were driven to write massive books to contest Beard, though he had not pretended to be doing anything more than pointing the way to further research. (We come back to this.)

One might well use Beard to make a point to students about anachronism. Beard, like others who stress economic reality as the real reality, has been accused of anachronism in saying or implying that there was, in 18th century America, a sense of a conflict between liberty and property. It is in the wake of this erroneous assumption that such writers have assumed further that a desire to guarantee the protection of property must have necessitated conspiracy. This is a basic flaw -- the eighteenth century, in good Lockeian fashion, regarded liberty and property as inseparable, rather than antagonistic.

One basic methodological flaw which might be used as an example for students is in Beard's statement that if all supporters of the constitution owned property of type A, and all opponents owned property of type B, we would know it was the ownership of type A property which was the moving spirit in the drafting and/or support of the Constitution. Cecilia Kenyon's stork story might be used to demonstrate the fallacy here -- that of the beginning student in sociology who discovered that rural Sweden had more storks than urban Sweden, and a higher birth rate as well, and concluded that in Sweden babies are brought by the stork.

It should be noted that Beard's thesis involves, logically and actually, a re-characterization of the decade before the Constitution -- the Confederation period -- the once-called critical period. Once, it seemed clear to historians that this had been a time of chaos and peril. To an extent, of course, the uncritical acceptance of the hero, or demi-god, portrait was responsible for the uncritical acceptance of the critical nature of the pre-constitutional period. One must have some disaster from which the heroes can rescue the nation. Beard called the critical period "a phantom of the imagination produced by some undoubted evils which could have been remedied without a political revolution." (Beard it was who gave us the phrase "without fear and without research," referring to the work of Fiske, author of the book titled "The Critical Period of American History".) And it has been clear for some time that a more balanced assessment of that time is indeed called for. Historians to whom the name Charles Beard is anathema recognize his contribution in forcing us to view the positive side and achievements of the period. So much seems settled, but problems remain -- they are problems of emphasis, of shading and they become important in the light of the questions that are generally asked about this segment of history.

If we were simply interested in gaining some insight into the state of things in the 1780's in America, we would be very likely to conclude, in the light of the latest work on this period, that it was a time somewhat unsettled, with major problems -- economic and otherwise -- some of them pretty clearly attributable to the deficiencies of the governmental structure and distribution of power (as virtually everybody seemed to see) and that it was equally a time of recovery, of promise, of creativity on many fronts (Samuel Eliot Morison calls it the creative period) and (as Edmund Morgan has stressed) of experimentation on many levels. We would probably, for example, see the difficulties caused by the fact that the British West Indies trade had been cut off as serious, but on the way to solution by increased trade elsewhere; in particular we might note the opening up of trade with the Orient. We should probably conclude that the Federal (central) government really did need the taxing power, and the commerce power, and that that was so obvious that it would surely have come about fairly speedily. And so forth.

Nor -- if we were just looking for some insight into the state of things in the 1780's -- would it perhaps matter terribly whether we concluded that this was a time 'basically,' or 'preponderantly,' of trouble, difficulty, etc. or a time 'basically' or 'preponderantly' of promise.

But the inquiry has been, and is likely to be, framed in terms of the good or bad faith of the founding fathers, in painting, as they did, a picture of stagnation, corruption, anarchy and in general impending disaster. We are called upon to say whether their actions, in the words of a contemporary, "were calculated to impress the people with an idea of evils which do not exist." [emphasis added] Did they deliberately distort? When the matter is put thus, we must face our material differently. We must not simply say that the period was, or was not, hopeful and productive. Rather we must ask whether reasonable men might, in good faith, have differed on the question of whether the country was headed for disaster. In this inquiry the burden of proof, it seems, should be on the side levelling the charge of deliberate distortion. Can they meet it? In my view they cannot, or at least have not. And here it is pertinent to note, among other things, that to men involved daily in the most distressing of the nation's problems things might have looked worse than they did to the average citizen, or for that matter, to the remote historian.

One can certainly go on and on taking Charles Beard apart -- it's good fun. His critics appear to find it an endless source of amusement, and so effective have they been that I do think we will never put Humpty-Dumpty together again. There are those who have tried; Jackson Turner Main, for example, bent his efforts to doing unto Forrest McDonald what Forrest McDonald had done to Beard -- and Main concluded that the scholar seeking an interim interpretation (that is presumbably one that would do until that happy day when all the returns are in and the historians can retire) would do better to rely on Beard than on McDonald. Needless to say, McDonald retorted by criticizing the accuracy, the logic and just about everything else of Main's criticism. It is also true that Lee Benson has come up with something like a defense of Beard -- though a Beard extensively re-formulated for the purpose. In any case, the issue emerging from all this which I suggest you might wish to bring to the attention of your students, is this. How good an idea is it for the historian to devote himself to the destruction of another historian's work; what, at least are the pitfalls, and how serious or avoidable are they? I take Forrest McDonald's work as an example, mainly because his first book "We the People" was the most massive and the most influential critique of Beard. Now McDonald, it must be understood, set out not to refute Beard but to do the work which Beard himself said would have to be done to test his hypothesis, and let the chips fall where they may -- or so McDonald says. Nor would I presume to doubt that that was his intention, and that every conscious effort was made to arrive at an objective assessment. But could he, in the nature of things -- or rather of people -- really manage that super-human task? Let's look at the obvious facts. McDonald, going after the full story, performed a labor of Hercules. It would have been a shattering anti-climax to discover that Beard was right. There is a place for a book which brings about the downfall of Charles Beard that is not attainable by the book that supports the Beardian hypothesis. How many of us, embarking on such an enterprise, could resist the temptation to hope at least that Beard was wrong? Perhaps McDonald did, but at the least his work -- the nature of the task he set himself -- opens for us the question of unconscious distortion by the scholar who writes with an ax to grind.

McDonald made a lot of mistakes; in that he resembles the rest of us. That some or most or all of them were a result of a need to refute Beard cannot be proven and may not be so. But he did make one king-sized blunder which seems to me very probably attributable to his having written to prove something. It is, at any rate, the type of error which is likely to come of ax-grinding scholarship. It is moreover an interesting type, and what is more an interesting example thereof. And finally it illustrates the interpretive problem on the petit scale.

It happens on occasion that the historian, putting together the pieces of the historical jig-saw puzzle before her (or him), finds that they add up to something which simply does not make sense. All one's intuition, feeling for the probabilities -- sometimes possibilities -- of a situation cry out that somewhere something is wrong. Alarm bells go off. That is, they do unless the picture before you fits well, and supports, some thesis which you are anxious to establish.

It is manifestly of major importance to the Beardian hypothesis that the framers of the Constitution prohibited state laws impairing the obligation of contracts. If one were Charles Beard, and trying to demonstrate that the class of holders of personal property were the dynamic force behind the Constitution, one might use that provision as exhibit A. And that is just what Beard does. Then, if one were Forrest McDonald, one would be overjoyed to discover that the provision got in there more or less by accident, or by the design of one or two people at most, and that it was against the will of the Convention. And that is just what McDonald discovers. A most remarkable discovery!

McDonald sees the story this way:

> With respect to the negative clauses -- the restrictions against attacks on property by state legislatures -- it was observed earlier that a fourth of the delegates had voted for just such 'attacks.' It is therefore not surprising to find that when the clauses forbidding paper money and establishing the sanctity of contracts came up for a vote on August 28, many of the delegates opposed the prohibition of such legislation. . . .

> There was considerably more opposition to the contract clause [than to the paper money clause]. Rufus King's motion that there be 'a prohibition on the States to interfere in private contract' immediately evoked a barrage of criticism. After some discussion the Convention approved a substitute motion, made by Rutledge, from which King's proposal was deliberately omitted and which provided instead only that ex post facto laws and bills of attainder be prohibited. . . . Though the votes of a dozen or so men are only highly probable, not certain, it appears from recorded statements and a process of elimination that no fewer than twenty-seven of the thirty-eight delegates present voted for Rutledge's motion to scrap the sanctity-of-contracts clause." (pp. 106-107)

Now this is a tale which might surprise even one who did not know that the Constitution includes the very clause which we have just been told the delegates voted to scrap. If you do happen to know that the clause is there, you may find yourself utterly bemused. How did it get there? McDonald tells us in a footnote:

> [7] King's contract clause was restored at the very end of the Convention by the Committee on Style, and it slipped through without debate in the dying moments of the Convention. Only in this manner was it worked into the Constitution at all. . . . (pp. 107-108)

So we are asked to believe that this crucial provision slipped through a convention which did not want it, without debate, and that nobody noticed -- then or later. Now it does seem that the improbability of this course of events is so clear that all kinds of alarms should have rung in the mind of the historian who proposed to tell his public that that's the way it was. And it is likely that McDonald's failure to hear alarms is not unconnected with his desire to refute Beard. And the worst of it is, that when McDonald turned from testing Beardian hypotheses to telling the story -- when he wrote his own history of the period 1776-1790, he stuck to this version of the inclusion of the impairment of contracts clause.

> Elsewhere, he [G. Morris] used words that slanted the meaning of clauses, and in at least one instance he audaciously inserted a clause that had been explicitly rejected by the convention. This would, in the passage of time, prove to be one of the most important details in the Constitution: the clause prohibiting the states from passing laws 'impairing the obligation of contracts'. In context, all Morris meant by it was to give the Bank of North America the subtle protection it sought, by preventing the legislature of Pennsylvania from again revoking its corporate charter -- which was legally a contract.*
>
> *That Morris could make minor changes was possible largely because the members had no official full draft; the changes are easier for the historian to detect because Farrand (Records, 2:565-80) constructed a draft which can be compared with the draft of the Committee on Style. As to the contract clause,

> King had proposed it on August 28 and Morris had opposed it and Wilson and Madison supported it; it was defeated (ibid., 2:439-40). Whether it was Wilson, King or Madison who persuaded Morris to insert it cannot be ascertained, but Wilson is the most likely candidate. For one thing, Wilson, as the bank's lawyer, was acutely sensitive on this point; for another, he had a particular awareness of the effect of such a clause on corporate charters; see Journal of the Council of Censors, August 27, 1784, vol. 2, pp. 520-26, in the Public Records Division, Harrisburg, and Wilson's arguments before the Pennsylvania legislature in behalf of the bank's charter, in Philadelphia Evening Herald, September 7-8, 1785. See also Baldwin's résumé to Ezra Stiles, December 21, 1787, in Farrand, Records, 3:170, wherein Baldwin gives Wilson equal credit with Morris as author of the final draft. (pp. 186-187, The Formation of the American Republic 1776-1790.)

Perhaps you would like to know how the clause got there. On August 28th, King made his proposal. Gouverneur Morris objected. Sherman responded, "Why then prohibit bills of credit?" Wilson "was in favor of Mr. King's motion." Madison thought its inconveniences overbalanced by its utility, and, by the way, thought that nothing less than a negative on the State laws could "secure the effect." Mason objected to King's motion. Wilson said, "The answer to these objections is that retrospective interferences only are to be prohibited." Madison said, "Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void." Rutledge "moved instead of Mr. King's motion to insert -- nor pass bills of attainder nor retrospective laws." (In the printed Journal, ex post facto appears instead of retrospective, and this is correct "according to marginal notes in the Washington and Brearley copies of the Report of the Committee of Detail." Farrand, Vol. II, p. 440, f.n. 19) Rutledge's motion passed. (Farrand, Vol. II, pp. 439-40) The next day "Dickensen" mentioned that he had found on examining Blackstone "that the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite." (Farrand, Vol. II, p. 449) The Committee of Style added the phrase "Nor laws altering or impairing the obligation of contracts," (Farrand, Vol. II, p. 597) which was altered to its present form on September 14th (Farrand, Vol. II, p. 619). (According to Mason's notes, on September 15th, apparently it was moved to "strike out ex post facto laws and after the words obligation of insert -- previous." This was "refused," Farrand, Vol. IV, p. 59.)

I believe that this is a fair and complete account of what happened in the Convention. From these facts, a story unfolds which is not quite the story told by McDonald.

The "barrage of criticism" came from Gouverneur Morris and Mason, one salvo apiece. Their objections are unclear to me, but Wilson's answer would indicate that the objections were understood to be based on a fear that the prohibition would extend to other than retrospective interferences. Madison, it appears, must have forgotten that the ex post facto prohibition already passed applied only to the national government. Rutledge's motion, substituting the term ex post facto, was thought to preserve the sense of King's motion, while making clear the limitation to retrospective interferences. The delegates did not vote "to scrap the sanctity of contracts clause." They thought they were voting for it until Dickinson read them some black-letter law. The Committee of Style inserted a clause which the delegates wanted. The wording was altered in the House and there was no debate because there was no opposition.

If one can manage it, it is surely desirable to make students aware of theories linking the whole period 1763-1790. And here the Merrill Jensen story might be told. Jensen is the link between Beard and those other so-called Progressive historians -- the school which found (in Becker's phrase) that the Revolution was a question not only of home rule, but of who shall rule at home. Jensen, in his early work "The Articles of Confederation" would seem emphatically to agree. The war, he said, was as much a war against the colonial aristocracy as it was a war for independence from Great Britain. It was a war whose aim was democracy, and -- this is important -- the Articles of Confederation were the expression of the democratic spirit of the Revolution. They expressed this spirit by vesting sovereignty, clearly and unmistakable, in the states. Moreover, this was done more or less over the dead bodies of a group in the Continental Congress -- conservatives -- who strove to vest ultimate sovereignty in a national government and failed, though they nearly succeeded.

Now this picture of two groups struggling over the location of sovereignty constitutes as you can see, an important underpinning for Beard, and socio-economic interpretations of the Constitution in general. One sees a group of aristocratic conservatives, thwarted by the Articles of Confederation, conspiring thenceforth for the creation of a consolidated, truly national government. And the picture has been swallowed whole by virtually everybody -- but not quite everybody. When, for example, one reads the account of the proceedings at this period in the Continental Congress by Herbert James Henderson, in his book Party Politics in the Continental Congress, one finds little resemblance to Jensen's picture. On the issue which this raises for the student -- that is, whom to believe -- I can say two things, one perhaps helpful, the other surely not. I had, through reading the sources, long ago come to the conclusion that Jensen's account was not satisfactory. I find no group in the Continental Congress in 1776-77 pushing for consolidation of power in a central government. The location of sovereignty does not appear to have been an issue at all at that time. Whether a desire for state control was "democratic" or not "democratic" -- whether it stemmed from an abiding trust in "the people" or a desire to hang on to a lucrative state office -- the fact seems to be that virtually everyone was for it in 1776-77. I cannot detect a thwarted and therefore conspiratorial group who finally came into their own with the counter-revolution known to us as the Constitution. Now my own conclusions, arrived at through independent research, do not help your students who are faced with historians' conflicting accounts. So here is a suggestion that may. It seems to me that Jensen's writing suggests that he (too) began with a large, over-arching hypothesis, and read his materials with an eye to their tendency to support that hypothesis. Henderson, so far as I can tell, simply dug into the materials to see what he could see. My suggestion, then, is that, by virtue of the difference in approach, Henderson's account is more likely to be accurate. This is a rule of thumb with, of course, severe limitations -- putting it into operation is anything but easy -- but I do put it forward for whatever utility you find in it.

Ultimately, it would seem, in trying to interpret the slice of history which we are calling the formation of the U.S. Constitution, we must decide just what it is that demands an explanation. It has been suggested, for example, that it was natural to be an anti-Federalist. The war was, after all, fought for home rule, against a distant central government. Now if that is the assumption -- if that is the frame of reference -- then we have to explain the Federalists. On the other hand it has been suggested that there is discernible, from 1763, a growth of nationalism and of a sense of national identity -- and that the Constitution, far from representing a sharp break with the past, is simply an expression of that nationalism, and that sense of national identity. From that perspective, of course, one would feel that what requires explaining is anti-Federalism.

One way and another a goodish bit of time and effort have gone into determining what, in fact, made men supporters or opponents of the Constitution. And an interesting note has sounded through the work of many who have embarked on this enquiry -- a note of approval of the Federalists and disapproval of the anti-Federalists -- a kind of back to Bancroft mood. In the words of one cynic, we have "a variety of eclectic treatments which agree only in filiopietistic admiration for the founding fathers." McDonald is an example of this attitude; here he is setting the scene at the opening of the Philadelphia Convention -- there were 12 men, he tells us (naming them) "Possessed of an idea of a great nation and possessed of the ruthlessness and the daring and the skill that make ideas into reality." [The Formation of the American Republic 1776-1790, p. 162]. The implication of conspiracy is there, and Beardian, but the tone is admiring -- there is nothing small or sordid about being possessed of an idea of a great nation -- it's not a bit like being possessed of continental securities and a desire to see their value increase.

We find the same phenomenon in the work of Cecilia Kenyon -- or rather, we find its corollary. Kenyon's work on the anti-Federalists is a case of historical interpretation stood on its head. Anti-Federalism had been in general portrayed as democratic, and therefore good. Kenyon's view is decidedly otherwise -- what others have seen as an abiding faith in the people she sees as distrust. She recognizes that the Federalists expressed doubts about the wisdom and virtue of the majority -- but, she points out, that does not mean the anti-Federalists did not -- and in fact they did -- they had these same doubts, ". . . /they/ especially feared the legislative majority of a national government, and . . . /they/ criticized the Constitution on the grounds that it violated the principle of separation of powers and did not have enough checks and balances" -- hardly the position usually thought of as "democratic." On the other hand Jackson Turner Main disagrees -- his conclusions tend to restore the anti-Federalists to their place as democrats.

The Beardian hypothesis may be out -- but economic interpretation is not -- or more precisely a vivid sense of the force of socio-economic factors -- and, fortunately, of all others. Work such as Main's on the anti-Federalists shows a willingness to recognize and allow for the variety of influences shaping people's ideas and therefore history. As research and analysis continue, the scholarship grows richer, subtler and more complex, and we are faced finally with the interpretive problem on the grandest scale of all -- that is the question of whether we can interpret at all. We must and do recognize that multi-causal interpretations are the only kind that will conceivably approximate reality -- but at its extreme the multi-causal is no interpretation; one reaches the point of concluding that the actions of each individual must be explained in terms of a set of facts unique to that individual. As Jensen said, "The more I study the American Revolution the more I realize how necessary . . . [an] awareness [of complexities and exception] is. Conceivably one could write a book on the Revolution with one line of generalization at the top of each page, with the rest of the page consisting of footnotes pointing to the exceptions, qualifications, and contradictions. It might be history, but I doubt it."

Well, it surely is not the history one would wish to write, or (heaven forbid) to read. But whether it is or is not history as it happened seems to me very much an open question -- and one that I leave with you.

Teaching Law and Legal Fictions

G.B. Warden

Problems involving law and legal history appear with annoying frequency when studying reform movements, labor, minorities, race, women, treaties, legislation, civil rights, consumer protection, social relations, crime and politics. For a subject with such universal relevance, with such a direct or indirect influence upon our daily lives and with such an apparent certainty and clarity, law still remains a subject obscured by impenetrable language, thorny technicalities, mysterious processes of reasoning and decision-making -- in short, all the problems, paradoxes, contradictions and dilemmas of normal human experience. Teachers and students, not being professional lawyers, often feel intimidated about an ignorance of legal subtleties and unsure about the proper exploration of legal rules. Above all, there is a nagging feeling that something is wrong or out of joint between lofty, desirable, apparently simple legal goals and the hard-headed, mechanistic, complicated means by which we try to accomplish or understand the processes and purposes of the legal system. If not doomed to failure, we seem to have at least two strikes against us from the very start. After trying to teach and learn the Constitution or other legal issues, we often end up only with an abiding ignorance, a naive, superficial optimism or an equally fatal cynicism.

For present purposes, I would like to explore some possible ways of coping with such dilemmas in trying to teach and understand legal terms, legal language, legal reasoning, legal rules, legal analysis and larger questions of law, history, society and individuals.

I suppose the over-arching theme of my remarks is an elaboration of what Justice Holmes called the "illusions of certainty." We have a written constitution and galaxies of legal rules affecting property, contracts, harmful conduct, social relations and individualism. We tend to think of such public or private rules in terms of absolutes and universals. I need not tell teachers that such rules have some very fuzzy edges and mushy substance, but, more often than not, students who are relatively new to such subtle nuances seem to have a disturbing attachment to rules as expressions of absolute certainty -- either in the form of a mindless, cheerful faith that merely invoking a rule will produce a desired result or, at another extreme, an expectable adolescent rejection of authoritative rules as putdowns, ripoffs, hangups or sellouts. In between these all-or-nothing extremes, there is probably an even larger amount of confusion, ignorance, ambivalence, insecurity and misapprehension.

Far from being crippling defects or insuperable handicaps, those elements of illusive certainty, cynicism and anxious ambivalence can provide the basis for a rather startling and effective means of exploring legal problems. What seems to be universally fatal and uneducational is for teachers and students to begin by discussing legal issues in terms of clear definitions, precise terminology, facile phrasing, categorical certainty and universal applicability. Without wallowing in anarchy, chaos and perpetual confusion, the inherent uncertainties in legal problems should be recognized and emphasized from the very start; that will be reassuring to those who are ambivalent, enlightening to the uncritical optimists and familiar to the dogmatic nihilists.

It may also be a more honest and unhypocritical reflection of the teacher's own more sophisticated sensitivity to the difficulties of legal dilemmas. If teaching the Constitution or legal problems in history is just another sermonette from on high or parade of empty slogans, watching television commercials might be a more productive use of everyone's time, patience and imagination. Rather than start with sweeping declarations which quickly get shot down, it may be strategically and tactically wiser to begin with the paradoxes, uncertainties and dilemmas which are what law and living are all about. I have appended below fourteen classic gems of legal mind-bogglers, plus three more common-sensical problems, that offer some provocative departures for discussion of legal language, rules, reasoning and ethics. If any of you or your students can unravel them I will personally recommend you to the Supreme Court.

An initial problem is, of course, language. Legal terms suffer from the twin defects of incredibly detailed precision and at the same time incomprehensible vagueness. In law school courses on the Constitution it seems that over half the time is spent reviewing court decisions which have tried valiantly to define the word "commerce." (See #2 below.) Definitions lifted from dictionaries provide a little help but not as much as we or our students would like; often, legal terms are tautological or circular, in that one vague term is defined by other vague terms. (See #5 below.)

Many of you have standard classroom methods for teaching hard vocabulary -- word lists, cross-words, matching lists; in legal matters, it is even more essential to dwell on more than one meaning of a term, difficult though that may be. It is very unsafe to assume that the ordinary meaning of a legal word is correct; usually, the legal use of a term departs significantly from normal usage, and, just to make things more difficult, the legal term changes meanings when applied to different legal fields; terms like "executory" and "collateral" are a few with a thousand changing disguises, depending on differing legal issues. It is also hazardous to assume that antonyms and synonyms operate in law as they do in normal life. A heavy expensive law dictionary might help, but Mellinkoff's book in the Bibliography below offers some understandable, cheerful and teachable examples of slippery usage of legal terms. It is of course possible to get bogged down completely in legal definitions at the very start; rather than endless lists, pick a few terms at a time which generate several meanings for discussion and argument. Far from being a hangup, concentrating on a few key terms serves the valuable purpose of making students aware of changing meaning in different contexts. That sensitivity to language and its subtleties is far more valuable than an illusory attempt to drill endless definitions which turn out to be nebulous. Chances are students will have no difficulty in exploring the diverse meanings of "lawful," "good faith," "due process," "equal protection," and the like. If you and your students can start off with a natural response like, "What in the world does this mean?" and silently supply a question-mark after every legal term or legal rule, you will have gone a long way toward a sensible introduction to legal problems.

Language problems increase exponentially when trying to decipher legal texts and legal writing. In America after 1641 and in England after 1733, English was declared by statute to be the official language of the law, replacing law latin and law french. Somehow that idea has never really taken root in the legal profession. Lawyers and judges probably write worse than any other group of trained mammals, even worse than historians. Some legal writing has to be difficult, given the subject matter, but at times lawyers have a vested interest in replacing clarity with confusion. (See #9 and #10.) As Lord Mansfield remarked, "it would be very hard on the legal profession if the law were so certain that everyone knew what it was." Some help is on the way; in New York City, Rudolph Flesch and other linguists are collaborating with lawyers to translate legal mumbo-jumbo into "normal" language in standard contracts, leases and sales agreements. But do not expect complete reformation in this century.

In the meantime, I think teachers and students should feel free to condense, digest, translate, rewrite and paraphrase legal language as much as possible whenever it appears in historical context. That process is difficult, but I see nothing to be gained in learning or discussing legal rules which no one can understand. And in terms of historic context teachers probably know more about the meaning and common-sense implications of Marbury v. Madison or Dred Scott than most practising lawyers do, without getting bogged down in the legal gobbledegook of the original texts. Most legal sentences usually contain three or four simpler ones, and half the words can be thrown out as meaningless, redundant or irrelevant. Most teachers are competent to perform this editorial pruning; it may be educational, desirable, necessary and unavoidable for students to try their own translations. If very uncertain, you can lay out parallel texts with the original and its alternative meanings in normal language. A large amount of professional legal work is devoted to such editing, paraphrasing and rewording, so you and your students are not really any better or worse off than the experts. If you subject your students to legal texts in the original, they may pick up the worst possible habits and lose all respect for the law whatsoever. In short, there are ways in which the difficulties of legal prose can be transformed from a linguistic horror show into productive exercises of drafting and understanding legal rules, as part of your ongoing attention to the nuances of communication, meaning and vocabulary.

If you and your students have managed to wade through the swamps of legal prose, you still have to confront the difficulties of legal reasoning, so-called. In fact, there is no one thing as legal reasoning; the mental processes of lawyers and judges include several varieties of thinking; those mental strategies change over time, vary from judge to judge, and apply differently to specific legal problems. It is never clear which style of reasoning is being used or with what validity. (See #6.) Many legal opinions are overburdened with qualifications and syntactic signposts; other opinions race through the arguments without any qualification or indication about how the judge got from point A to point B except by some existential gestalt.

Briefly, there are only a few major ways in which lawyers and judges think through a legal problem. Like legal language, those methods are difficult for normal people to grasp, but the effort is worth it. First of all, there is logic, specifically in the form of a syllogism; that is, there is a major premise (all men are mortal), a minor premise (Socrates is a man), and the conclusion (Socrates is mortal). That type of reasoning is so simple that few lawyers ever resort to it or get away with it. (See #3 below.) It is not hard to show why logic has been called a way of "going wrong with confidence;" for example, all women are mortal, Socrates is a mortal, Socrates is a woman. Lawyers use some elemental logic but only up to a point at which other forms of reasoning take over. A second major strategy of legal reasoning is analogical (if A is to B as B is to C, A is therefore like C). This again looks nice, but analogy is the weakest form of reasoning. Analogy in fact allows you to put together and compare the most wildly incongruous concepts and make them appear identical. The main problem with logic and analogy is that their major and minor categories overlap so much that you can never be sure what guiding principle will produce a desirable conclusion. (See #10 below.)

A third type of legal reasoning is called "historical," but it really isn't, and it isn't even "reasoning." The historical method is based on precedent: "this is the way we did it last year, let's do it again." That type of thinking obviously ignores any historical difference between the past and present, and it is in effect not thinking but inertia or laziness. (See #2 below.) Strict adherence to precedent is now out of favor more and more, but students craving absolutes still have extreme difficulty coping with its contradictions. To students, it looks like some supposedly absolute rule is laid down, followed religiously and then overruled by another supposedly absolute rule which is the opposite of the first. Judicial precedents are of course more sophisticated than that, but, as law, they are vaguely similar to legislative acts which change frequently, and there we do not boggle at the contradictions involved. There is a theory that judicial decisions should always be retrospective, solving some past dispute, but never prospective, to determine future cases; also, that legislation should never be retrospective like an ex post facto law, but always prospective, guiding future conduct. It should be clear to you and your students that such nice theories do not work out in fact. Lawyers look to the latest decisions to guide their clients in the future; statutes are designed in part to stop or change some historic conduct. Historical reasoning, in law as in everything else, is a double-edged sword, and not very sharp, either.

A fourth style of legal reasoning is sociological. This is a relatively recent development. Before this century, lawyers and judges professed that in the courtroom they argued cases solely on legal grounds without any outside interference from political groups, attention to social trends or consideration of economic influences. For better or worse, no one really believes that any more; in trials and administrative hearings, the proceedings are designed to find out what is happening in the "real world" and if it does or does not fit with legal rules. True, we would not like the prospect if all legal problems were settled by reference to political majorities, social fads, or economic determinism (see #1 and #13), but at least their relation to legal rules is not so completely disregarded as it used to be.

These methods of legal reasoning are more or less an arsenal of general strategic weapons which lawyers and judges are accustomed to use according to specific issues. For teachers and students it is never entirely clear which type is being used, why, for what purpose and with what legitimacy. A Supreme Court opinion may be logically impeccable but sociologically or historically ridiculous. In using cases or opinions in class, you should, as with language, try to develop an awareness and sensitivity to the strengths and weaknesses of these different types of reasoning. They are, after all, the way that historians generalize and the way students justify their own choices and conduct.

There is another arsenal of tactical weapons that lawyers and judges use, which are necessary to consider if you have mock trials or read trial transcripts. Emotional appeals are the most familiar type of argumentation and persuasion. A more sophisticated weapon is the "distinction;" the evidence in a case and the legal rules fit in clearly with an established line of previous decisions, until a lawyer or judge starts "distinguishing," showing that some element at issue separates the case from previous ones and puts it under another line of decisions. Often, this distinction does not make any difference at all (see #1 and #14 below), but it is worth a try to argue toward a favorable outcome.

A more difficult tactical legal argument involves "legal fictions." In constitutional matters, there are the famous "implied" or "inherent powers." In trials there are "presumptive" conclusions about evidence or lack of evidence; in contracts there are "constructive" clauses inferred from or implied by people's conduct. (See Problems B and C.) This is where many people meet their doom, because lawyers and judges may know what these implied, inherent, inferred, constructive or presumptive elements are, but few other people do (see #6 and #11); those hidden strings or "legal fictions" are buried away in the difficult legal language of legal records, inaccessible and indigestible to the normal person. Needless to say, as you and your students try to unravel the obvious language of the law, the problems become more difficult when you have to become aware of and sensitive to the "legal fictions" which are pulled out of thin air. If you think the peculiarities of legal reasoning and legal fictions are irrelevant, consider the following statement by an eminent judicial scholar:

> Indeed, in some cases it is the function of judicial tautology and circularity to avoid giving a reason for a decision in a situation where it is better to give no reason than to give the real reason. This is apt to be especially true of legal fictions, which are legal doctrines that state a legal result in terms of assumed facts that are known to be non-existent.

A final technical problem is how to read a court opinion. Normal people, even if they understand the legal language, probably will not be able to pick out what is going on at all. Our courts are relatively unique in requiring judges to write a little essay justifying the court's decision; in many countries, the judges merely give a one-word decision and cite a law. In our appellate court opinions, the judge usually has to give a brief review of the facts produced at the trial court, of the procedural rulings by which the case came up from below, of the legal issues involved, of the proper jurisdictional powers of the courts; the opinion may or may not give the viewpoints of opposing counsel; usually, the judge launches into his own reasoning which in fact relies heavily on the reasoning of the more persuasive lawyer, pausing occasionally to dismiss counter-arguments; then finally there is the court's "holding," which determines the argument, and the final decision disposing of the appeal. To lawyers, the holding is the most important part, but finding it amidst the other verbiage is pretty hard. Indeed, there are in any opinion several mini-decisions which look nice and may be determinative, but are considered as mere "dicta" and not controlling. Often, the dicta are minor concessions to the losing side, but are contradicted by the final holding. Which is one reason why opinions look so contradictory. The judge inserts these little gems as he goes along as if he believed them to be true and then in the last paragraph says they are all beside the point and rules another way.

These opinions are fascinating to read if you have the time and the stomach for it. In short, paraphrased form, they might be worth giving out to your students. But usually it is the holding which is most worth remembering. The strategic and tactical reasonings leading up to the conclusion are occasionally worth talking about, because judges or lawyers may correct the faults used in an earlier argument and come up with a different conclusion in a case where the facts and issues seem identical with the prior case.

In law schools and legal writing, there is a huge emphasis on appellate opinions and Supreme Court decisions. Remember though that these little essays are only the tip of the iceberg; they say little about evidence excluded at trial; about the procedural haggling by which the case wound its way to the higher court; about the roads not taken; about the mistakes made along the way. Moreover, students get impatient with court opinions because the decision only covers one tiny case and one tiny part of a whole legal problem with vast social consequences. (See #8 below.) In the everyday world, things go on between millions of people; only a small part of those activities impinge on formal legal problems; those that involve legal problems may never lead to an arrest or suit; few arrests or suits go to trial; few trials reach an entirely satisfactory or conclusive result; few decisions are capable of being appealed; still fewer are actually appealed; only a fraction make it beyond the next highest court; only one dispute in a million gets sent to the Supreme Court, and only a few of those are heard; most of those are decided without an opinion. Many people yearn for the courts to decide on a whole range of legal problems, but the judges cannot go out and snatch cases off the street. By the time a suit or trial comes to court, a whole range of human experience has been filtered out, and narrowed down to a small issue. The judges can only rule on the legal issues in particular cases, not on the state of the world at large. People who believe that the courts should endorse, say, free speech once and for all have to realize that legislatures are supposed to take care of such general decisions while the courts are forced necessarily to go one case at a time from haircuts to dress codes, armbands, campaign ads, flag salutes, prayers, obscenity, pornography, and the huge variety of individual details that make up the general concept.

The disappointingly narrow scope of many judicial opinions is one fact of legal life which teachers and students need to get used to. Similarly, students need to be aware that legal opinions are just that -- opinions -- not abolute, all-or-nothing, either/or, universal declarations, despite contrary appearances. If your students have a tendency to crave absolutes or a nihilistic cynicism about the technicalities and ambiguities of legal problems, it is relatively easy to use the apparent deficiencies of law, language, reasoning and rhetoric to provoke discussions and explorations about what law is all about. Is it the command of the sovereign, as some theorists say? An expression of social and cultural folkways? What courts will enforce? What judges as state officials do as part of their jobs? The weapon of the rich and powerful? The protector of the poor and oppressed? A means to achieve socio-economic equality or to recognize unique, individual differences? When does a general statute aimed at uniformity, equality and other desirable social goals become inequitable to individuals and minorities? When does judicial attention to the rights and liberties of individuals, another desirable goal, become inequitable to those outside the privileged few? What does law, however defined, have to do with our apparently inherent feelings of fairness, justice and equity?

Such are the general problems which you and your students encounter in trying to understand legal problems. And, I may add, which you should grapple with, not only in class but in daily life as well. In the real world, it is usually best to get professional legal help, if at all possible, to prevent serious misunderstandings. Teachers should make special effort to get nearby lawyers and bar associations to help advise teachers on curriculum units and historical elements related to law; if kept within an historical context, chances are that the lawyers may not charge their usual fees. Some vestige of conscience and public service may even induce them to consult free of charge. In the classroom in dealing with legal problems historically, I do not think you or your students should feel intimidated or restrained about plunging into the complex details, language, varieties of legal reasoning, and tactical pitfalls. In terms of historical knowledge and historical inquiry, I think I can safely say after a long time being associated with lawyers and law teachers, that each and every one of you have a greater knowledge of the historical context of any past legal issue than any practising lawyer, judge or law teacher. If we are ignorant about legal technicalities (which are more the lawyers' fault than ours), we are omniscient, compared with what lawyers know about history. Indeed, I suspect that many legal problems of the present would have been resolved long ago if the lawyers and judges had something more than a fifth-grade grasp of American history. We are forbidden to practice law without a license, but if the same applied to practising history without a license, the lawyers would have been disbarred long ago, at the very least.

In short, the problems we face in trying to teach students about legal problems are expectable and normal. If we encounter frustrating disappointment in studying the Constitution and other legal issues, it may be because we and our students have started with an unrealistic reliance on the apparent certainty of legal rules. The inherent ambiguities and dilemmas of law, when admitted and elaborated upon, can be constructive and imaginative elements of any history course, if we can help our students avoid over-simplification and misleading abstractions. Our government may be one of law and not men, but it is us poor mortals who have to cope with the law. Equal treatment of unequal people may be the grossest injustice. The law may respect some persons too much and others not enough. When do desirable elements of "the rule of law" become so abstract that they begin to sacrifice human beings and aggravate the hardships of daily existence? We are no different from lawyers and judges in wrestling with these dilemmas, except that they have the power and get paid for it, while we do the paying. The problems are no less earnest for us. Professor Gilmore, I think, has expressed the major dilemma of law and society in his characteristic way:

> Law reflects but in no sense determines the moral worth of a society. A reasonably just society will reflect its values in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb.
>
> An unjust society will reflect its values in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

Legal Fictions, Lawyerisms and Other Dilemmas

1. In the 19th century judges agreed with lawyers who argued that a group of people (owners, investors and managers) known as a corporation was a "person"; as "persons," corporations were therefore entitled to protection under the 14th Amendment from state legislation which limited working hours, set minimum wages and regulated working conditions; such legislation violated the corporations' constitutionally guaranteed "right to freedom of contract" with workers. The same lawyers and judges agreed at the same time that a group of people (workers) known as a labor union was not a "person" and therefore not entitled to protection under the 14th Amendment; labor unions thus had no "right to freedom of contract" and were "criminal conspiracies" in restraint of trade.

2. At present, the "reserve clause" in major league baseball contracts allows owners of a player's first club to assign his contract to any other team. The players have argued that such clauses are "unreasonable restraints" of commerce and violate Federal anti-trust laws. In early cases the Supreme Court held that baseball games were merely local entertainments and not interstate commerce, so that reserve clauses did not come under anti-trust laws. Later the Court held that reserve clauses for boxers and tennis players were anti-trust violations. More recently, the Court has agreed that baseball is interstate commerce and that reserve clauses are anti-trust violations but that baseball is so "unique" that it and the reserve clause are exempt from anti-trust laws. The opinion did not explain why baseball was "unique" but did include verses from "Casey at the Bat," "From Tinker to Evers to Chance" and a nostalgic list of 82 old-time players.

3. In England a Parliamentary statute of 1854 regulating special types of elections imposed prison sentences on anyone convicted of willfully and fraudulently impersonating "any person entitled to vote" in such elections. A man was arrested for having voted under the name of a qualified voter who had recently died. After being convicted, the man appealed his case, and the judges let him go free. Why? Because the man had impersonated a dead person and, by definition, dead people are not "entitled to vote"; therefore, the man had not violated the statute.

4. The clerk of an English town wanted to divorce his wife but that could be done only by an act of Parliament which was very difficult to obtain. At the same time, however, he was asked to help draft parts of a complicated Parliamentary statute regulating waterworks, canals, locks, drainage and sewers in the region. Among all the clauses about water tables, pipes and regulatory procedures, the man inserted: "The town clerk's marriage is hereby dissolved." The bill passed and became law. The clerk left his wife legally. A new clerk was appointed. Was his marriage automatically dissolved because of the law?

5. A "tort" has been defined as an injury or harmful conduct which is not covered by contract law or criminal law. "Equity" has been defined as the system "of rules and procedures practiced in courts of equity."

6. In most states you cannot sue a five-year-old child for negligence resulting in bodily injuries. Why not? Because the legal standards of "due care" and "negligence" are those of a "reasonable person" and, by definition, a child is not "reasonable." But in the same states you can sue the same

child for the same injuries if you call it an "intentional assault" rather than negligence. Why? Because, according to the courts, although a child may not intend harmful results, a child does have sufficient knowledge to be aware that an act which is intended may have harmful results. Some courts have held that excluding children from being sued for negligence does not apply to eight-year-olds. A baby-sitter attacked by a child did successfully sue the child's parents for negligence on the theory that, like the dog which has exceeded the one-free-bite limit, the child was known as a habitual attacker of baby-sitters and the parents should have restrained the child or warned the baby-sitter.

7. Mrs. H was an elderly lady who lived in Maine. She had a son who lived nearby and a married daughter, Mrs. B, who lived in Missouri. Mrs. H wrote to Mrs. B saying that if Mr. and Mrs. B moved to Maine and took care of Mrs. H till she died, Mrs. H would provide room for them and leave them her property when she died. The B's moved to Maine and took care of Mrs. H. But they had frequent arguments with Mrs. H. She became so angry that she tried to evict the B's and deed her property to her son. The B's sued and got a court order preventing the eviction and transfer of property. And they lived happily ever after. Mainly because Mr. B in the evenings would read aloud to Mrs. H portions of the court's opinions.

8. The 14th Amendment made it unconstitutional for any state to pass or enforce any law depriving citizens of various rights, privileges and immunities affecting life, liberty and property because of race. Later the idea of "state action" was expanded to include not only legislative statutes but the local ordinances of counties and cities enforcing racial discrimination. Nevertheless, judges refused to strike down restrictive covenants imposing racial discrimination in private contracts and private leases, on the theory that they did not involve "state action." It only took 82 years until 1948 before courts recognized that judicial decisions of state courts allowing racial discrimination in private contracts and leases were an exercise of state action like statutes and ordinances. That was in a case for an injunction in equity; it only took 12 more years before the same novel idea was applied in court suits involving money damages.

9. In statutes laying down general guidelines for the future, legislators will often leave some parts vague purposely, on the theory that no statute can possibly specify every detail and future contingency, leaving it up to judges and courts to interpret the general provisions more specifically, fill in the gaps and be more particular as cases arise. This deliberate vagueness appears frequently with terms like "commerce," "restraint of trade," "due process," "good faith," "immoral purposes" and so forth. But when courts are called on to fill in the gaps and apply the general terms to specific individuals or cases, the judges will often refuse to do so, on the theory that, if the legislators had wanted some specific application, they should have said so in the statute.

10. A dockworker was hired by a contractor to do repairs on a ship at a pier. Through no fault of his own, the worker was injured while at work. There were four methods by which the worker could collect for his medical costs, lost pay and damages. In admiralty law, the contractor and shipowner would each pay half, regardless of their fault or differing degrees of fault. In older court cases, the worker could collect all his costs from either the contractor or the shipowner, depending on which was most at fault. In newer

court decisions, the worker could collect from both the contractor and shipowner, according to their proportionate share of fault. The injury could also have come under workmen's compensation in which the worker could collect from the contractor, regardless of who was at fault. On appeal, the judges decided that, since it was not clear which rule of payment applied, they would refuse to decide and the worker got nothing.

11. In buying and selling houses and lands, it is absolutely essential that the title of ownership changing hands be free of any defects. In buying and selling houses and lands, it is not necessary to be so careful about their physical condition and soundness. In buying and selling personal goods, food and appliances, it is necessary that the goods be in sound condition, but it is not necessary to be careful about the title of ownership changing hands.

12. At one time, judges ruled that money obtained by extortion was taxable income but that money obtained through embezzlement was not taxable income. If a person killed someone hoping to inherit the dead person's money, courts would prevent it, on the theory that people should not profit from their crimes. The courts have had a harder time when the person had an insurance policy naming the murderer as the sole beneficiary. Does the insurance company get to keep the money?

13. A farmer leased his property worth $500 to a coal company for strip mining on the express condition that at the end of the period the company would pay for repairs to the land, estimated at about $25,000; at the end of the period, the company refused to make the repairs; the court held that the company need only restore the property to its original value, despite the contract clause, which was "economically wasteful." A doctor promised a boy with a badly scarred hand that he would operate using skin grafts and make the hand "100% perfect"; the doctor had never done such an operation before, and, after surgery, the hand was covered with dense, matted hair; the court threw out the boy's suit against the doctor for negligently performing the operation and allowed him to recover only for breach of contract; but he could recover only for the difference in value between the hairy hand and the scarred hand, not for the difference between the hairy hand and a "100% perfect" hand.

14. Until recently, a citizen could not sue the federal government or its employees and agents in a civil suit without the government's consent. Justice Holmes justified this so-called "doctrine of sovereign immunity" by arguing that a citizen exercising his civil rights could not exercise them against the government which created and protected those rights. In 1946, however, Congress modified the doctrine by passing an act which permitted citizens to sue the government for personal injury, property loss or deaths caused by government agents. The act denied citizens the right to a jury trial in such suits, punitive damages, and accumulated interest on money claims before judgment. The act exempted government agents from being sued if they were acting according to a statute, even though the statute was invalid. The act exempted suits arising from mail deliveries. The act exempted suits against government agents for any activity involving discretionary power, even if that power was abused. The act also exempted government agents from being sued for assault, battery, deceit, false imprisonment, malicious prosecution, abuse of process, false arrest, misrepresentation, libel and slander. Shortly thereafter, inflammable ammonium nitrate fertilizers being shipped to France under the Marshall Plan exploded, killed hundreds of people and destroyed most of

Texas City, Texas. In various district and appellate courts, the surviving victims suing under the act were told that the government agents had indeed shipped the fertilizer negligently, that the agents had been following government regulations which had been negligently drafted but that the victims could not recover because the negligent regulations and negligent actions fell under the statute's exemption of "discretionary power."

Problem A: The Traffic Light

Red, green, yellow: what do they mean? How do you know? Who told you? Why those colors? What others could you use? Why does NYC have only red and green on Park Avenue? What happens with people who are blind or color blind?

What other devices would serve the same purpose as traffic lights? Barriers like railroads? Spikes? Sounds? Armed guards? How do these devices compare with lights in terms of cost, efficiency?

How do traffic lights work? Are they the same at all crossings? Who makes the devices? How do they know how long the lights should shine? Does the timing stay the same at different times and places?

Can you find out from the local police or traffic authority how they plan the timing and placement of traffic lights? How can you get one put in (or taken out)?

How much do traffic lights cost to install and keep up? How much money do they bring in by way of fines? How much does the light system cost for the people in the city? How many people are subject to one light per hour, day or year?

What would happen if there were no lights? What reasons are there for having lights? Do lights benefit cars more than people? If a light breaks down, how should motorists behave?

How can the general purpose of traffic lights be enforced? Would you stop for a red light late at night when no one is around? Why do some cities allow a right turn at a red light? Why do some cities require cars to stop if people are in the cross walk?

Some officials have electronic devices which allow them to change the lights. Is that fair? Are fire engines and police cars allowed to disregard the lights?

What happens if there is an accident because someone ran a red light? If someone is injured? If the violator is an ambulance taking a dying person to the hospital? If a blind person with a white cane crosses against the light?

Try and think up a rule or set of rules which will be The Law of the Traffic Lights. What will you have to consider in drawing up your rules? How will they be approved? How can you enforce them? How much will your system of rules cost? Compare your rules with the traffic laws as they actually are in your community. How would your rules work better?

As a project, study a crossing nearby at certain hours to see how many people obey or disobey the lights. Does the light system work for people making turns? Pedestrians?

Are traffic lights an infringement of your rights to do as you please? What are their advantages and disadvantages? What improvements or trade-offs should there be?

Should there be traffic lights in school corridors?
How do rules relate to human behavior and human needs?

(Consider the same questions with stop signs, direction signs, parking meters)

Problem B: The Hitch-hiker

You are walking down the street on your way home. A friend stops his car and offers you a lift. When you reach home, he won't let you out until you pay him a dollar. Do you have to pay it? Should you pay it?

What if you had your thumb out?

What if he was at a stop light and you got in the car without asking?

What if your friend was driving a yellow car with a meter in it?

If he didn't turn on the meter?

If he was almost out of gas and stopped at a gas station and then asked for a dollar?

If you didn't have any money, to begin with?

If he lived next door to you and would have stopped there anyway?

If he lived on the other side of town and went an hour out of the way to take you home?

If he was your minister?

If you already owed him a dollar?

If he already owed you a dollar?

If he blew a tire or had an accident on the way home?

If he asked you for a dollar when you got in?

If he asked you for a dime?

If he took you to the wrong street?

If he asked for the dollar as a loan?

If he kept driving around until you paid?

Can you be made to pay without a formal agreement?

Should favors require payment?

Can he force you to pay up on a promise you never made?

What would happen if you had to sign a contract whenever you got into someone else's car, taxi or bus?

When should you insist on a contract?

What would a hitch-hiking contract look like?

Problem C: The Dinner Guest

A friend asks you to dinner on a certain night. He has invited his boss and hopes to get a raise from the boss. The boss refused to come until he heard you were also coming. Your friend urges you to accept saying how much he counts on you to help him get the raise. Otherwise, he'll be in big trouble.

The evening comes and your girl friend asks you to her house and you accept her invitation. The next morning your friend calls to say he is suing you. Because you didn't keep your promise for dinner, your friend not only lost the raise, but his boss got so mad he fired your friend. Your friend demands that you pay him not only the wages he is going to lose but the lost raise as well. Should you pay? Can he get the court to force you to pay? Should courts enforce such promises? Should people always be forced to keep their promises? Even if it hurts? Even if it means people will refuse to make promises?

A Short Bibliography of Legal Studies

* Paperback
** These books are heavy, expensive and technical, but they might be handy for a school or department library for teacher preparation, reference, or case materials to be digested as class handouts.

LANGUAGE:

*Daniel Mellinkoff, The Language of the Law (Little Brown): a relatively painless and sometimes humorous introduction to linguistic pitfalls in legal language
**Black's Law Dictionary
**Ballantine's Law Dictionary

GENERAL:

*Edward H. Levi, An Introduction to Legal Reasoning (U. of Chicago): short sketches of legal reasoning applied to early cases in products liability and the Mann Act
Karl L. Llewellyn, The Bramble Bush (Oceans): the best introduction for non-lawyers
Jerome Frank, Law and the Modern Mind (Coward McCann/Peter Smith): well-written, with a healthy skepticism
*Jerome Frank, Courts on Trial (Princeton): old but still pertinent
*Dudley Lunt, Road to the Law (Norton): anecdotal
**Richard A. Posner, An Economic Analysis of Law (Little Brown): a cold-blooded, conservative approach
Alan P. Herbert, Uncommon Law: delightful parodies of legal opinions
**H. Berman and W. Greiner, Nature and Functions of Law (Foundation Press): cases and essays covering most fields of law
*E.A. Hoebel, The Law of Primitive Man (Atheneum): anthropological case studies, good for a different perspective
*Jeremy Bentham, Handbook of Political Fallacies (Norton): the first systematic law-reform tract
**H. Hartzler and H. Allen, Introduction to Law (Scott Foresman): contract cases, from a different approach
**J. Bishin and C. Stone, Law, Language and Ethics (Foundation Press): good for posing legal dilemmas
J. Noonan, Persons and Masks of the Law (Farrar Strauss): how individuals and personalities are incorporated into law
*Lon Fuller, Legal Fictions (Stanford): tries to rationalize artificial legal concepts

SUBSTANCE:

*G. Gilmore, Death of Contract (Ohio State): brief, well-written survey of doctrine in the past century
**A.J. Casner, and B. Leach, Property (Little Brown): exhaustive
*N. Dorsen, The Rights of Americans (Pantheon): indispensable
**W. Prosser, Torts (West): the standard treatise
**Friedrich Kessler and G. Gilmore, Contracts (Little Brown): cases with good notes
**J. Kimbrough, Summary of American Law (Lawyers' Cooperative): a digest

HISTORICAL:

*L.M. Friedman, A History of American Law (Simon and Schuster): survey
*Alan Harding, Social History of English Law (Pelican/Peter Smith): survey

*J.W. Hurst, Law and the Conditions of Freedom (Wisconsin): short essays on 19th century law and economic development
*F.G. Kempin, Historical Introduction to Anglo-American Law (West): short survey
*D.F. Fleming and B. Bailyn, eds., Law in American History (Little Brown): essays
*Perry Miller, Legal Mind in America (Anchor): 19th century documents

SOCIAL:

*Edwin H. Shur, Law and Society (Random House): survey
*V. Aubert, Sociology of Law (Penguin): international essays
*W. Friedmann, Law in Changing Society (Penguin): international
*S. Mermin, Law and the Legal System (Little Brown): survey

CURRICULUM MATERIALS:

*M. Franklin, Biography of a Legal Dispute (Foundation): from start to finish
*L. Bonsignore, et al., Before the Law (Houghton Mifflin): good cases and problems
*Massachusetts Bar Assn., In Search of Justice: teaching unit for high schools; MBA, One Center Plaza, Boston 02109
*Minnesota Bar Assn., The Student Lawyer with teacher's manual: very good but localized
*Constitutional Rights Foundation, Education for Law and Justice: talks and sketches of 14 curriculum projects; Room 616, 1719 North Broad Street, Philadelphia 19122
*ABA, Youth Education for Citizenship, Working Notes:

1. Bibliography of Law Related Curriculum Materials
8. Media
9. Gaming

These are long lists, with prices, reading levels, short summaries and publishers of school materials.
American Bar Association, 1155 East 60th St., Chicago 60637

English Roots of American Constitutionalism

John S. Beckerman

While the Constitution of the United States is worthy of examination at any time, it is a particularly fitting subject for a conference in this year of bicentennial chestbeating. According to Alexis de Tocqueville, it was 1787 rather than 1776 that was our country's moment. As he wrote in Democracy in America:

> the efforts of the Americans in throwing off the English yoke have been considerably exaggerated. Separated from their enemies by three thousand miles of ocean, and backed by a powerful ally, the United States owed their victory much more to their geographical position than to the valor of their armies or the patriotism of their citizens.

What impressed Tocqueville much more than the War of Independence was the confession by the Continental Congress on 21 February 1787 of its inability to govern effectively or to resolve satisfactorily the problems which threatened the republic. His views are direct and refreshing, to say the least, to a readership which is being progressively smothered by a detritus of bicentennial minutes.

> If America ever approached (for however brief a time) that lofty pinnacle of glory to which the proud imagination of its inhabitants is wont to point, it was at this solemn moment [i.e., 1787], when the national power abdicated, as it were, its authority. * * * It is new in the history of society to see a great people turn a calm and scrutinizing eye upon itself when apprised by the legislature that the wheels of its government are stopped, to see it carefully examine the extent of the evil, and patiently to wait two whole years until a remedy is discovered, to which it voluntarily submitted without its costing a tear or a drop of blood from mankind.

The remedy of course was the federal constitution, and a remarkably durable remedy it has been.

In certain respects, however, the remedy was old wine in a new bottle. Even a casual reading of the United States Constitution and the first ten amendments reveals institutional arrangements and doctrines derived from British traditions of government, many of them hundreds of years old. The idea of a bicameral legislature with the power to impeach and try public officials, for example, was already well established in England by the end of the fourteenth century. Other traditions date from even earlier times.

These similarities are hardly surprising since, as Pierce Butler, one of South Carolina's delegates to the Constitutional Convention, wrote, its members "in many instances took the Constitution of Britain, when in its purity, for a model, and surely we could not have a better." Not everyone saw wisdom in this course of action. Luther Martin of Maryland, addressing his state's legislature after the convention complained that "we were eternally troubled by arguments and precedents from the British Government," and Elbridge Gerry of Massachusetts cautioned in a letter that "maxims taken from the British constitution were often fallacious when applied to our situation which was extremely different."

It should be noted that the jurists involved in drafting our constitution were not familiar with English constitutional development as we know it today, in the light of modern historical research, but as they found it interpreted in the writings of the great justice and parliamentarian of the early seventeenth century, Sir Edward Coke. Coke was deeply engaged both as a judge and, after his dismissal from the bench, as a member of the House of Commons, in the struggle to reject the extravagant claims to sovereignty which were being made by the Stuart kings, and more specifically to combat arbitrary and oppressive royal governmental acts.

This brings us to the term constitutionalism: just what does it mean? In general parlance it means the restraint by law of arbitrary power, particularly executive power, in government. Charles McElwain defined its essential quality as "a legal limitation on government...the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law." In terms made familiar to us by the Senate Watergate hearings, constitutionalism is the principle of government of laws, in which governmental acts are limited by justice embodied in written laws, rather than government of men, in which executive power, unfettered by law, is exercised arbitrarily, subject only to the caprice or will of the ruler.

On a trip to Miami in 1936, the British playwright and pundit George Bernard Shaw commented in an interview:

> You have a good president and a bad constitution, and a bad constitution gets the better of a good president all the time.

It may now be said, after the summer of 1974 that our constitution, whatever its defects, ultimately gets the better of a bad president also. That quality, with all due respect to Shaw, is much more to the point.

From where, then, do we get this tradition of constitutionalism, of legal restraint on executive power? In the seventeenth century English lawyers like Coke believed that the English constitution was immemorial -- that the basic institutions of English government, king and parliament, had existed more or less unchanged since Anglo-Saxon times, with the common law as the fundamental law of the land. In fact this was not true. As we now know, the basic institutions of English government had developed and changed tremendously during the Middle Ages. During the Middle Ages, right into early modern times there was a tension in English government between two principles.

The first, from Roman law, said that the king was legibus solutus, free from the laws. Another related Roman maxim said "Quod principi placuit legis habet vigorem," what is pleasing to the prince has the force of law. And oppressive kings of England from Richard II at the end of the fourteenth century to Charles I in the middle of the seventeenth were fond of quoting these maxims to show that they could do anything they wished. They ruled dei gracia, by the grace of God, and therefore they claimed to be responsible to no one but God, and certainly not to any earthly superior. Richard II said, on one famous occasion, "the law is in my own mouth and in my breast," implying that whatever he wished should be the law of the land, that his will was the law.

On the other hand was a principle which came to be one of the favorites of the English common law tradition, that the king was below the law, the king was subject to the law, because it is from and through the law that the king obtains his authority. This principle is nowhere stated better, perhaps, than in the treatise of the English lawyer and judge, Henry of Bracton, which was written in the 1230s:

> The king ought to be subject to God and the law since law makes the King. Therefore let the king render to the law what the law has rendered to the King, namely, dominion and power, for there is no king where will rules and not the law.

Here Bracton was playing on a contrast well known to his contemporaries, a contrast from natural law writings of the twelfth century between the *rex*, the legitimate king, the king who rules justly, according to the laws, on the one hand, and the *tyrannus* or tyrant who rules arbitrarily without observing any law, on the other.

Now, King John of England, who reigned from 1199 to 1216, has, alas, received bad reviews from historians. According to Macaulay, John was a "trifler and a coward." In view of the French historian, Charles Petit-Dutaillis, John was *cyclomanique*,a psychopath -- something like a manic depressive with fits of energy followed by periods of depression and inertia. Lately some historians have tried to argue from bits and pieces of documentary evidence that there may have been an attractive side to John's character. Let us look briefly at three of them.

It is known, for example, that King John took frequent baths in his travels through the country and employed an official known as a bathman. In the first six months of the year 1209 John was recorded to have taken eight baths. So he enjoyed a high standard of personal cleanliness, for his time, anyway. The second scrap of evidence, a curious entry in the rolls of the royal chancery reads: "The wife of Hugh de Neville gives the lord king two hundred chickens that she may lie one night with her husband, Hugh de Neville." We shall probably never know what this really means. John was something of a profligate who kept several mistresses, some of them the wives of his greatest barons, and it has been argued that this document represents royal largesse in allowing one of his mistresses to buy her way back into her husband's bed. A third example -- many men held land of John, according to a great variety of feudal tenures, some in return for military service as knights, some in return for personal services of various kinds, and some for rents.

Now, one of the king's tenants, a man named Rolland, held the manor of Hemingstone in Suffolk, in return for which he was obliged each year on Christmas Day to render services such that he would come into court *coram rege*, into the presence of the king, and render for his lands *unum saltum et siffletum et unum bumbulum* -- a leap, a whistle, and a fart. Historians have taken this to show that King John may have had a sense of humor, even if not a very cultivated one.

Now, however this may be, it is clear that John's personality also had a definitely unattractive side. In the words of A.A. Milne, "King John was not a good man, he had his little ways..." Well, what were some of John's little ways? He was ruthless, often cruel and violent (these traits seem to have run in his family), greedy and self-indulgent. We know, for example, that he threw into a dungeon in Windsor Castle the wife and son of one of his vassals, William de Braose, and there let them starve to death. It is probable that John had his nephew, Arthur of Brittany, murdered. According to one chronicle, he did Arthur in with his own hands, stabbing him in a fit of inebriation. John seems to have taken great pleasure in witnessing judicial duels -- trials by battle which ordinarily ended in the grotesque death of one of the participants, and one historian has remarked on the morbid delight which he took in such pastimes. All in all, John was suspicious and untrustful, always seeking out treachery. He was not a man who inspired affection or even trust in his subjects, great or small. But enough of this personality.

We mainly remember King John because he was forced to grant to his barons, in the meadow of Runnymede on the Thames on a day in June 1215, Magna Carta, the great charter, a document which is frequently taken to be the cornerstone of English constitutional government. And if we look at the text of Magna Carta, with its sixty-two clauses, we can get some idea of the nature of John's government and of the specific grievances which the barons had against it.

Contrary to modern popular myth, John was not in the least a weak king. If anything he was much too strong, and threatened by his oppressions to establish totally new relationships between the kind and his subjects. He was threatening to turn the kingdom of England into a despotism.

Law at the beginning of the thirteenth century was primarily customary law, that is, unwritten law, practices and relationships which had acquired legal force through long usage, or as the lawyers say, prescription. Custom was subject to pressure and change, because rightful custom had nowhere been written down and thus nowhere defined precisely or permanently. And it was custom, particularly those customs which regulated dealings between a feudal lord and his vassals which King John was threatening by his oppressions to change. It was these unwritten customs which were written down and thus defined precisely as law for the first time in 1215, in Magna Carta.

Let us examine just a few of the document's specific provisions. Twenty of the clauses are devoted to the redress of feudal grievances, and eighteen more are devoted to the subject of justice. Consider: chapter forty-nine, "We will immediately restore all hostages and charters which were delivered to us by Englishmen as security for the peace or for faithful service." As I have said, John was not a man who readily trusted people. He frequently demanded from them hostages and blank charters, personal securities and authenticated documents which would grant away in advance any lands or castles which John might later decide to take back from his barons, much like blank checks.

Chapter sixteen, "No one shall be distrained to render greater service from a knight's fee or from any other free tenement, that is thence owed." John was accustomed to demand greater services than should have been demanded from his tenants in return for their lands.

Chapter twenty, "A free man shall be amerced for a small offense only according to the degree of the offense." John was accustomed to taking exorbitant judicial fines.

Chapter thirty, "No sheriff or bailiff of ours or any other person shall take the horses or carts of any free men for carrying service except by the will of that free man." Royal officials during John's reign were accustomed to confiscate the personal property of English subjects regardless of how the owners felt about it.

Chapter forty-five, "We will appoint as justiciars, constables, sheriffs or bailiffs only such men as know the law of the kingdom and well desire to observe it." Previously John had been accustomed to appointing royal favorites, occasionally members of his wife's family, who knew nothing about English law and used these positions of responsibility simply to oppress the populace.

Now, the obvious end of most of these provisions is to bind the king to particular practices. The king has agreed not to do in the future things that he has done in the past, not to oppress his subjects in ways in which he has oppressed them in the past. If we look at chapters twelve and fourteen, we see that there is a provision for levying scutages and aids certain kinds of feudal taxes. We need not go into the details about them, but these two chapters are noteworthy because in the middle of the eighteenth century they were construed by the colonists to mean "no taxation without representation." This is one example of the myth of Magna Carta, later constructions placed on the document which had nothing to do with its contemporary meaning, and these constructions serving as justifications for totally new constitutional doctrines and limitations on government. In many respects, the myth of Magna Carta was as potent, even more potent, for later times, than the document itself.

But perhaps the most important and most significant clauses of the entire document were chapters thirty-nine and forty. "No free man shall be captured or imprisoned or seized or outlawed or exiled or in any way destroyed, nor will we go against him or send against him except by the lawful judgment of his peers or by the law of the land." "To no one will we sell, to no one will we deny or delay right or justice." Here is the famous origin of our due process clause. It was taken by later jurists to signify the origin of jury trial, this statement by judgment of his peers. In fact, it had nothing to do with jury trial at the time, and the later construction results against from an historical misunderstanding. But these two chapters, which go together, were frequently glossed by later statutes in England, and in the middle of the fourteenth century a statute of Edward III took them as follows:

> No man of whatever estate or condition he may be shall be put out of his land or tenement nor taken nor imprisoned nor disinherited nor put to death without being brought in answer by due process of law.

This statute, looking back to clauses thirty-nine and forty of Magna Carta are the origin of the precedent for the Fifth Amendment to the United States Constitution, one of the most important in the Bill of Rights, the famous due process clause, so the Charter may also be seen as the origin and the tradition of protecting the rights of the individual subject against the sovereign, against the monarch, against the government.

Magna Carta was confirmed fifty-five times between 1215 and 1416, by every king from Henry III to Henry V. By the end of the Middle Ages it had come to be regarded as the fundamental law of England. According to the seventeenth century lawyers it was the foundation of English liberty, and this view was adopted and expanded by the great eighteenth century jurist, Sir William Blackstone. According to William Pitt the Elder, Magna Carta was "the Bible of the Constitution."

Although, as we have seen, the myth of Magna Carta was at least as potent an historical force as the document itself, there is no doubt but that Magna Carta deserves its reputation as a great constitutional document. It is appropriate that in this year of the Bicentennial of our country's revolution the government and people of the United Kingdom have offered the people of the United States the loan of one of the four surviving originals of Magna Carta for one year, to be displayed in the Rotunda of the Capitol in Washington, there to be ogled by hundreds of thousands of tourists, many of them school children.

Magna Carta, as we have seen, was directed against the arbitrary exercise of executive power. It contains nothing about legislative irresponsibility, which in some people's view is one of the greatest threats to constitutional government today. In a debate on March 17th of this year the House of Representatives voted to accept the offer of the gift of Magna Carta, as well they should. Ironically, the House also decided to send twenty-five Congressmen along with their wives and staff members to bring in an Air Force jet, to pick up this generous gift and bring it to Washington with an as yet undetermined cost to the American taxpayer.

In closing I can do no better than to quote the words of Representative Anderson of California who observed during the House debate,

> the Latin words Magna Carta mean great charter. This of course has nothing to do with the charter of an Air Force plane for twenty-five Congressmen and their wives, although I am sure this too will be a great charter. Rather, Magna Carta refers to the document sealed by King John of England limiting his power.

Indeed, it is there that we must look ultimately to find the English roots of American constitutionalism.

Suggestions for further reading:

On constitutionalism, C.H. McIlwain, Constitutionalism Ancient and Modern (1941).

On Magna Carta, J.C. Holt, Magna Carta (1965), and
W.S. McKechnie, Magna Carta (1914).

On Coke and the seventeenth-century common lawyers,
J.G.A. Pocock, The Ancient Constitution and the Feudal Law (1957).

On the interpretation of Magna Carta, Philip B. Kurland, "Magna Carta and Constitutionalism in the United States: the Noble Lie," in The Great Charter (1965), 48-74, and A.E. Dick Howard, The Road from Runnymede. Magna Carta and Constitutionalism in America (1968).

On legislative irresponsibility, "Debate on House Resolution Providing for Delegation of Members of Congress to go to the United Kingdom to accept loan of an original copy of the Magna Carta," Congressional Record-House, March 17, 1976, H 2010-H 2025.

The Constitution: Sexist or Sex Blind?

Cynthia E. Russett

The Constitution: Sexist or Sex Blind? In a nutshell, both. You assume, we all assume, that our constitutional guarantees apply equally to all, whether Christian, Jewish, Moslem, or non-believer, whether black or white, male or female. In 1963 the President's Commission on the Status of Women framed this belief rather succinctly as regards sex. The Commission wrote, "Equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the basic law of the land."

Must it? Or was it so basic to democracy when the framers of the Constitution met in the 1780s to hammer out that fundamental law? What they actually produced, it's true, was an instrument of universal applicability, though with one important exception -- the discreet differentiation between "free persons" and "all other persons" as the basis for state representation in Congress. With that one exception the Constitution was vague about its understanding of "We, the people." Certainly it contained no suggestion that it was not intended to reach out to women. But the fact is that the Constitution was conceived and written in the language of the English common law, under which the married woman was a non-person, a legal nonentity.

William Blackstone, who codified that law about ten years before the Constitution was being written, wrote that "the husband and wife are one person in law. That is, the very being or legal existence of the woman is suspended during her marriage or at least is consolidated into that of her husband under whose wing, protection and cover she performs everything." In common law, then, the woman, if married, as most women were, in effect ceased to exist as a person. If, then, the men who met to draw up the law of the land, steeped as they undoubtedly were in the traditions, in the language, and in the concepts of English common law, did not in fact explicitly exclude women from the rights and privileges of citizenship, can we assume that they intended to include them?

Perhaps we can, since we have no evidence that the subject of women was discussed. But one could argue, and constitutional lawyers have argued since that time, that the Constitution as written and as regards, the intent of the framers, simply did not apply to women.

That is one reason why nineteenth century feminists characteristically grounded their case not in the Constitution, but in the Declaration of Independence. Listen for a minute to Ernestine Rose, one of these early nineteenth century feminists, eloquently appealing to the principles of that Declaration in 1851. "Here," she said, "in this far-famed land of freedom, under a Republic that has inscribed on its banner the great truth that 'all men are created free and equal, and endowed with inalienable rights to life, liberty and the pursuit of happiness' -- a declaration borne, like the vision of hope, on wings of light to the remotest parts of the earth, an omen of freedom to the oppressed and downtrodden children of man -- ...even here, in the very face of this eternal truth, woman, the mockingly so-called 'better half' of man, has yet to plead for her rights, nay, for her life. For what is life without liberty, and what is liberty without equality of rights?

And as for the pursuit of happiness she is not allowed to choose any line of action that might promote it..." And Rose goes on to ask, "is she not then included in that Declaration? Answer, ye wise men of the nation, and answer truly; add not hypocrisy to oppression! Say that she is not created free and equal, and therefore...that she is not entitled to life, liberty and the pursuit of happiness. But with all the audacity arising from an assumed superiority, you dare not so libel and insult humanity as to say that she is not included in that Declaration. And if she is, then what right has man, except that of might, to deprive woman of the rights and privileges he claims for himself?" You can see at once that this was a much more effective challenge than any that would be based on the presumed constitutional rights of woman.

Now in fact women always considered themselves and were usually considered by others to be citizens of the United States under the aegis of the Constitution, albeit citizens with circumscribed rights and privileges. Of these the most obvious deprivation was the denial of suffrage. It was not an egregious deprivation, however, so long as large numbers of others were disenfranchised by property qualifications. But in the Jacksonian era these qualifications began to fall, state by state, and the electorate broadened to include all white males over twenty-one. There remained the slaves, whose cause countless women abolitionists championed during the antebellum period. After the war feminist women were confident that the strong ties they had forged in the pre-war period between abolitionism and feminism (or women's rights, as it was then called) would bring the newly freed blacks and the women together into the ranks of voters. Imagine their shock and disappointment when in 1866 they read for the first time Section Two of the Fourteenth Amendment designed to prevent the states from denying the vote to the newly freed blacks, and saw that it referred to males only. This was the first time the word "male" had ever been used in the Constitution. It signified constitutional acquiescence in the principle of female disenfranchisement.

Six months after the Fourteenth Amendment was ratified in 1868, Radical Republicans, still anxious about the black freedman's vote, introduced into Congress the Fifteenth Amendment: "The right of citizens of the United States to vote shall not be denied or abridged by color, or previous condition of servitude." On paper, at least, black male suffrage was constitutionally secure. Women suffrage, black or white, was constitutionally dead.

The Fourteenth was a landmark Amendment in the history of constitutional law. Its famous Section One defined United States citizenship for the first time: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." It assured that Fifth Amendment guarantees against deprivation of "life, liberty or property, without due process of law" could not be infringed by the states. It assured, too, that no state could "abridge the privileges or immunities of citizens of the United States" or "deny to any person within its jurisdiction the equal protection of the laws." With the exception of the Nineteenth (woman suffrage) Amendment it was and remains unquestionably the most important part of the Constitution for women as a class.

Nor were women slow to appreciate that fact. In 1870 Myra Bradwell of the state of Illinois sought the support of the Fourteenth Amendment for her right to choose an occupation in the face of state prohibition. The Supreme

Court of Illinois had refused to grant her a license to practice law in that state, on the grounds that Illinois state law prohibited females from legal practice. The United States Supreme Court upheld that ruling, stating that the right to pursue an occupation of one's choice was not one of the "privileges or immunities of citizens" upon which the states were forbidden to infringe. This was the first constitutional ruling that very clearly differentiated between the sexes.

In the course of its decision the Court referred frequently and puzzlingly to the rights of "women as citizens," a phrase not found in the Constitution and not otherwise defined. Did the Court mean to suggest that the rights of citizens were different from the rights of "women as citizens," in which case perhaps none of the constitutional assurances of the rights of citizens applied to women at all? One hopes not. The Court did not choose to say.

The Supreme Court in Bradwell v. Illinois indulged in some telling reflections on the basis of its decision:

> The civil law as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband...
>
> It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

One wonders if Myra Bradwell knew that she was not only fighting the state of Illinois but she was also fighting God.

While Bradwell v. Illinois was still before the Court, another midwestern woman appealed to the Fourteenth Amendment, this time to win the vote. In 1872 Virginia Minor, "with whom," as her brief noted, "is joined her husband, Francis Minor, as required by the law of Missouri" (reminding us that she was not eligible as a woman to bring suit in court in her own name and person), contended that under the provisions of several sections of the Constitution, but particularly of the Fourteenth Amendment, she had been wrongfully deprived by a Missouri registrar of the right to register and vote. "There can be no division of citizenship," the Minor brief asserts, "either of its rights or of its duties. There can be no half way citizenship. Woman, as a citizen of the United States, is entitled to all the benefits of that position, and liable to all its obligations, or to none." The brief went on to cite a statement the Supreme Court had just made in the Slaughterhouse cases: "The

Negro, having by the Fourteenth Amendment, been declared a citizen of the United States, is thus made a voter in every state of the Union." "If this be true of the Negro citizen of the United States," the brief contended, "it is equally true of the woman citizen."

So also Susan B. Anthony, indicted and convicted in 1873 of the crime of having voted in the presidential election of the previous year, took her stand upon the Fourteenth Amendment. With the passage of the Fourteenth Amendment, she asserted, "the only question left to be settled now is: Are women persons? I scarcely believe any of our opponents will have the hardihood to say they are not. Being persons, then, women are citizens, and no state has a right to make any new law, or to enforce any old law, which shall abridge their privileges or immunities...Is the right to vote one of the privileges and immunities of citizens? I think the disfranchised ex-rebels and ex-state prisoners all will agree that it is not only one of them, but the one without which all the others are nothing."

The Supreme Court was equal to the challenge. It was willing to grant that women as well as children were indeed "persons," i.e., citizens under the Constitution. But in a unanimous decision in the Minor case it held that citizenship was one thing, suffrage quite another, and that citizenship in and of itself did not confer the vote. The Court thus condemned feminist women to the agonizingly slow route of a federal woman suffrage amendment, the Sixteenth Amendment as sanguine women hoped it would be when it was first introduced in Congress in 1878, the Nineteenth Amendment as it was when finally ratified forty-two years later. Minor, was woman's Plessey v. Ferguson: women were declared to be second class citizens with fewer rights than other citizens.

Having learned that the Fourteenth Amendment did not assure them the right to vote, or to choose an occupation without interference, women learned in 1880 that it also sanctioned their exclusion from juries. In Strayder v. West Virginia, a case decided in 1880, exclusion from jury service was held to be a denial of the equal protection clause of the Fourteenth Amendment for blacks. Such a practice, stated the Supreme Court, would be "practically a brand upon them, affixed by the law, an assertion of their inferiority." But lest anyone draw the obvious inference of its applicability to women, the Court hastened to dissassociate women specifically from the force of their reasoning, though both race and sex are comparable groups, large, permanent, natural and unchangeable.

The natural order of things that featured so prominently in the Bradwell decision loomed large also in the next landmark constitutional decision for women, the famous Muller v. Orgeon of 1908. Three years before, in Lochner v. New York, the Supreme Court had declared maximum hours laws applying to both male and female bakers unconstitutional. In an effort to salvage half a loaf, Oregon had then enacted a maximum hours law for women alone. Inevitably the constitutionality of that law came to rest on the biological differences between the sexes. The court stated:

> that woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time

> on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
>
> Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him.
>
> ...The two sexes differ in structure of the body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, in influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence.

The Court therefore upheld the constitutionality of the Oregon law.

Protective legislation is a good thing, but with sex established as a reasonable ground for differentiation, the expansion of Muller language -- safe-guarding women because of their peculiar biological fragility -- inevitably occurred. The same argument has been used since Muller in excluding women from juries, in permitting different treatment for men and women in licensing occupations, and in excluding women from state-supported colleges. "The tragic irony of Muller," writes one scholar, "was that it was a progressive attempt to secure a real equality of rights for women in the unequal struggle for subsistence. The rationale of the decision was to equalize the bargaining position of women in industry; the long range reality was to hamper it."

Such arguments have continued in use to the present time. In Goesart v. Cleary (1948) the Supreme Court, acting apparently in loco parentis, ruled that a Michigan law prohibiting the licensing of any female as bartender unless she was the wife or daughter of the male owner did not violate the Fourteenth Amendment. Bartending by women, said the Court, might "give rise to moral and social problems," although female waitresses might serve liquor in male-owned establishments, since there "the man's ownership provides control."

In White v. Florida (1961) the Supreme Court declared constitutional a Florida statute providing that no woman could be selected for jury duty unless she had previously registered her desire so to serve before the clerk of the circuit court. The Court noted that "despite the enlightened emancipation of women from the restrictions and protections of bygone years,...woman is still regarded as the center of home and family life," and therefore ought to be relieved of civic duties like jury service unless she herself determined that such service was "consistent with her own special responsibilities."

Paternal concern also manifested itself in a Mississippi decision (1966) that declared, "the legislature has the right to exclude women [from juries] so that they may continue their services as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity and noxious atmosphere that so often pervades a courtroom during a jury trial."

The equal status of women before the law, like that of blacks, is theoretically guaranteed by the Fourteenth Amendment, but the history of cases like these makes clear the slenderness of that support. For women the Fourteenth Amendment has been a paper tiger. Until 1971 the Supreme Court never once rejected restrictive legislation directed against women on the basis of the equal protection clause. In that year the Court finally struck down an Idaho state law that automatically preferred men over women of equal qualifications as executors of estates.

Because the Fourteenth Amendment has proved so unreliable, women have worked for nearly half a century for a constitutional amendment to guarantee equal rights under the law. First introduced into Congress in 1923, the Equal Rights Amendment reads very simply: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." It was approved by Congress in the spring of 1972, and at present awaits ratification by four more states to make up the required thirty-eight. Whether that ratification will be forthcoming is by no means clear. Opposition has been growing to the equal rights amendment in recent months, based on fears that ERA will mean women in the armed forces and men in the women's bathrooms, or that mothers with small children will be forced out of their homes into the job market to satisfy the requirement for mutual parental responsibility for children, or that widows will be deprived of their Social Security benefits. Some of these objections are obviously weightier than others. That the ERA is a far-reaching amendment is obvious, that it will cause real hardship for anyone is dubious, that it will, on the other hand, improve the economic status of many working women is certain, but in the end the decision to make is one of principle, not of pragmatism. Either discrimination based on sex, even "good" discrimination, is undesirable or it is not. Either complete legal equality of men and women is desirable or it is not. And those are the grounds, it seems to me, on which that decision should be made.

Now, how can you, as teachers, make use of all this? Obviously there is ample material here for feminist rage, but I doubt that you consider teaching feminist rage as one of your functions. I leave it basically to your own invention, with a few suggestions. You might, for example, want to turn your students loose on the question of the logic of the law. How was it possible for Justices of the Supreme Court to decide in one case that black men, because they had been declared citizens under the Fourteenth Amendment, were thereby made voters, and then to tell Virginia Minor that her citizenship did not entitle her to the vote? An even better illustration of this kind of about-face is provided by Mr. Justice Bradley who on one day in the 1870s, in the Slaughterhouse cases, argued that any kind of monopoly that deprived individuals of equal access to an occupation (in this case butchering), was a contravention of their Fourteenth Amendment rights, and on the very next day, in the Bradwell case, approved the Illinois statute that made the law a male monopoly and closed if off to fifty percent of the population.

If your students then decide, as I suspect they will, that the law is something more than logic, you might want to explore the ramifications of that fact. You might want to point out that Justices no more than the rest of humanity are vaccinated against the social traditions and beliefs of their time, that indeed nineteenth century law decisions provide some of the most succinct summaries we possess of the state of social opinion in Victorian America. And this in turn might provoke you to reflect on what we mean by man-made law, and on how much of the history of law can effectively be taught as an internal phenomenon, that is, a matter of received tradition and legal precedent, and, on the other hand, how much needs to be approached with the tools of history or political science or sociology.

In so doing, you might even wind up at the position elegantly defended by the philosopher and psychologist, William James. James was always infuriated at people who spoke or wrote as if human beings were thinking machines, that is to say, beings in whom reason could somehow be antiseptically sealed off from will and desire. Over and over again James hammered home the point that we live and we love and indeed we even think as whole people, people whose minds are infused with emotion as well as with logic. He went on to suggest that some of the best thinkers are just those who are engagé, who care about the results of their inquiry, whose logic is informed by passionate human concern.

Whether or how much this applies to the particular narrative that I've been relating I leave to you to decide. But the kind of narrative that I've offered here seems to me to be perfectly suited to speculations of this kind and offers very clear evidence of the living, changing, organic nature of the law, even so presumably remote a kind as constitutional law. I would hope, in fact, that it would provide students with a real sense of the immediacy of the Constitution to every one of us. The Constitution is more than Marbury v. Madison. It doesn't deal merely with squabbles over an obscure bridge somewhere in Massachusetts. Ultimately the Constitution touches the lives of every one of us. At one time it told Myra Bradwell that she could not be a lawyer in the state of Illinois. It told Virginia Minor that she could not vote in Missouri. It told the women of Michigan that they could not tend bar if they were unrelated to the barkeep.

Today of course it tells women, just as it has always told men, that they can do all of these things and more. Does the phrase "privileges, or immunities of citizens" sound dry and formal? Not when it translates into whether a person can sit on a jury or whether a woman can carry more than ten pounds up a stairway on the job. The Constitution really is, in short, the final guarantor of our right to life, liberty and the pursuit of happiness, and those are not hackneyed phrases. They are reality. Not a bad idea to think about this year, or any year, and certainly not for women alone, but for us all.

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Urban Problems Before the Courts

Professor Douglas Yates

I think since I'm new to this enterprise, as you are, I should begin with one or two prefatory notes so that what we do will be most useful. I take it that your interest is more apt to be in finding out material or themes for some social studies courses rather than finding out about technical aspects of law. Would that be a fair statement? That is very fortunate because I am not a lawyer and you will be very quickly disappointed if you ask me procedural questions about how teachers' strikes are resolved and what kind of pleas can be made.

When I was asked by Bruce Garver to do this seminar I said that I really am not an expert on law but I have worked in the city and studied it, and thought that I had some observations about the way in which urban problems are handled in the courts that would be of some interest. So I really wish to be somewhat modest in my aspirations, although if I'm too modest I wouldn't forgive you for going away. So I'll try to make good on at least some broad points.

It should be obvious that increasingly in our society, policy problems of all sorts are being handled by the judiciary, and that aside from the imperial presidency that branch of government which has probably most extended its sphere and influence has been the court system, and particularly the Supreme Court. One could spend an awful lot of time going over constitutional law related to the city, and I think that would be relatively uninteresting as it would have no theme to it. So I propose instead to pose the problem of city government as I see it at the moment in general terms, and then make an argument that the increased role of the use of the courts to resolve urban problems has made urban government more difficult. That's the first thesis.

And the second thesis is that for the most part the courts are not doing a very good job in handling urban problems, but then I want to kind of pull the punch at the end by saying that one of the most common myths about the courts, which is the alleged abuse of plea bargaining, is probably not such a bad thing after all. So I will not come full circle but contradict myself at the end, and I hope to do that in the period of time which will leave generous space for questioning.

I have just finished a book called the Ungovernable City, the message of which is and ought to be apparent in the title. I think that increasingly the city simply cannot govern itself. If you give a great deal of money to a city government, my view is that the city is so fragmented and so reactive and erratic in its policy-making that it's likely not to do very much in solving problems, that city halls tend to be overburdened, that if you ask the question who governs, the answer is in the city no one really. Rather power is scattered all over the city, school systems and police systems are to a very large extent feudal baronies which are not under the direct control of mayors, and that there is so much pressure on city hall and on the mayor coming from so many different places, from the very different neighborhoods and communities that exist in the cities, from the different bureaucracies, from the different interest groups including unions, including teachers' unions, and from different levels of government, higher levels of government, the states and the feds, that a mayor or a central policy-maker is faced with a barrage which he really can't cope with. I also believe that revenue sharing, which is a new law after all, a new legal arrangement, and the financial crisis all add to that burden on city hall and make the city increasingly ungovernable.

Given this incapacity of the city government to govern effectively, we accidentally are using other mechanisms to govern the city, and one mechanism is the use of the courts, thus allowing tough problems such as busing, low income housing, union strikes, injunctions -- to be handled in the judiciary and taken out of the hands of city councilmen and mayors. There are other ways to avoid the sort of incapacity of city hall, one of which is to allow the bureaucracies to run themselves, and I think there has always been a great deal of that.

Indeed, one of the historical tasks of city hall or the mayor has been to try to bring bureaucracies under their control, and it's much more apparent in the police sector than in your own sector, but in police, just think of the historical fact that policemen have never been very easy to keep track of and to regulate. From the very earliest days of police services one of the major problems of organization was how to find out what the policemen were doing. They were wandering around out on the street and you didn't know where they were, so the early fathers of cities installed systems such as street lamps with red lights on them, and a red light would go on and a policeman would have to come and answer the red light or go back to the station. And later they had various call boxes, and people thought they had the system licked when they invented the walky-talky and the motor patrol. But if you read the papers you know that even that is far from being foolproof. People can "coup" -- go off duty and sign off and sit and drink coffee. My point is that the problem of legal control is inherently a difficult one. It's hard to regulate what you as a teacher do in your classroom, it's hard to regulate what policemen and firemen do., attempts to regulate by law such behavior have typically come to very little. I'll come back to that when we talk about Miranda and the Escobedo decisions.

To return to the basic point: Increasingly it seems that our society is run by courts. In the case of South Boston and in the state of Alabama they are literally societies run by courts. The South Boston school system is being administered by a court. The mental health system in Alabama is being run by a court system. It's worth noting I think right at the outset that the courts weren't designed really to do that. Courts are designed to make decisions presumably on important disputes, and increasingly we are turning to them in the city and elsewhere for actual day to day administration. And I think probably the most important thing I can say today is that that seems to be both a mis-use of the court function and a function the courts aren't very good at.

My argument is that with one exception, the courts are doing rather badly in handling urban problems. I'm not saying they're not having an impact. They're having a major impact, but I don't think they're doing it very well. The area where the impact is very great and probably successful, though I leave it to you to judge success, is in the area where there is a concern for service, for equity in services and equality in financing between the city and suburbs. And you may know better than I if you're from Hartford, that there is a recent decision in Hartford which holds against the Hartford suburbs which have used federal money but have not accepted any low income housing. And so here we have the use of a court to try to force a greater sharing of financial and the burdens of poverty by the suburbs. That is in keeping with the whole series of court decisions, Supreme Court decisions and lower level decisions which are increasing or making an equal protection -- Fourteenth Amendment's equal protection clause -- work to balance the burdens of the city and the suburbs. They're going a distance but not as far as many people would like.

Another recent court decision which Mr. Carter got tangled up in is the decision to force low income housing, and the court held that it -- the federal government, HUD, could force low income housing in the suburbs where there was proof that federal officials and city officials had conspired to prevent such housing from being built. That's a rather limited decision, note. It isn't the decision many advocates of low income housing or opening up the suburbs wanted. It didn't say as a matter of principle across the board that federal housing could be placed in suburbs. Only in cases where there was a pre-existing pattern of discrimination. You might want to think of this area of court activity as concerned with what we could call the spillover effect from the cities, how you handle the spillover of poverty and so forth in the metropolitan area. And these decisions are an attempt, as I said, to equalize responsibilities.

One of the recent decisions, which is an important one, in this respect, is U.S. v. Shaw. Shaw concerns a town in Mississippi where you had a classic pattern of unequal services, where the black community had streets that weren't paved and no fire protection, and the white community had fine streets and fine fire protection. The court held that within city limits where there was clearly an imbalance in services of a gross sort that that violated the equal protection clause, and it ordered the town to redistribute its services so as to produce some sort of equality in services.

That's as I say a very important line of court decisions with enormous consequences for the city because if you ever reach the point where the court ordered, say, equal financing of schools throughout a state or insisted on low income housing being built everywhere including small towns, one very great part of the urban problem would probably be solved. That is, the city would not have a monopoly as it presently does on the poor and the homeless. But what's critical here is that exclusionary zoning has never been knocked down as such. Zoning as you may know derives from the police power, and it's a curious derivation because the police power is in fact the most important legal power of the city. It allows the city to act, it justifies governmental action to protect public peace and avoid public nuisances, and early zoning laws grew up as an extension of the notion of a public nuisance. The classic case is where you had a factory or a slaughterhouse next to a private home and there were feathers all over your yard and that was deemed a public nuisance by the courts and hence zoning laws regulated land use.

We now have zoning laws which go much, much further. They allow four acre zoning and they allow all kinds of regulations and exclusions as to lot size and multiple family dwellings and so forth. The question to watch is whether the court will ever say that it is against the Fourteenth Amendment, a violation of equal protection, for one suburb to be richer than another. So far the line of decisions has only said that it is a violation of the Fourteenth Amendment where you patently discriminate in housing or education. They have never been willing to say that economic inequality is in itself a violation of the Fourteenth Amendment. Until the courts reach that position, it will be impossible for Greenwich, Connecticut, to be found "illegal," to the extent that Greenwich, Connecticut,runs its schools and it runs its housing as a function of its economic base and that is not at present unconstitutional, though it is unconstitutional for housing agents and rental agents in Greenwich to discriminate against poor people and black people. We are not at present in the courts saying that certain kinds of communities are inherently unconstitutional which would be an interesting judgment. If a court should say that West Hartford is "illegal" -- I don't know what would happen.

Contrast these Court actions with the experience in busing and the experience in criminal justice (where the Supreme Court tried to govern by law the behavior of policemen). Contrast it with union strikes.

I would take the view that the courts have been massively unsuccessful in their efforts at desegregation because they have gotten into the business of legislation. The district judges, federal judges are handing down long legislative documents which tell the city of Houston or of South Boston exactly how to desegregate and when, by what means. That is not the common or the standard judicial function, which is to do as the court did in U.S. v. Brown and Board of Ed, merely pronounce the principle that separate but equal education was unconstitutional.

So we now have South Boston, and South Boston really is the litmus test of how you feel about court intervention. I don't want to argue it as a point of ideology, but I think what is interesting is that the courts are crude instruments for making detailed policies. I'm really repeating the same thing about the failure, inherent failure of courts to administer. But it seems to me that the courts are stuck on a simple point of principle. They say you ought to desegregate. Well, how fast? It's not clear. These are matters which really ought to be left to city and state governments and to school systems which are probably better able to handle the details. But in any case, I think the courts' reliance on the legal principles of desegregation makes the sort of judicial involvement here insensitive to a range of values which are equally important.

Consider the logic of the Supreme Court's view on desegregation which leads to busing. The argument is that on moral grounds separate but equal educational facilities are unconstitutional. It's an argument based on racial justice. There is with that an educational argument based on Kenneth Clark's finding that poor, black children feel discriminated against however good the education if they are kept in separate classrooms, that separate education is inherently a demeaning or inferior experience. That line of argument was extended by James Coleman's findings that the most important thing you can do to improve educational achievement was to mix races. Actually his finding was that you should mix classes, but it has always been reported, or a matter of purely racial integration.

Another argument made by the court was that if you do not have black and white children together in schools, we will produce two separate nations and there will be no possibility of racial harmony.

Now, what strikes me as interesting is that as you watch the educational experience unfold vis-a-vis busing, the legal and moral issues which are the ones the court started with, are about the only values that really seem to be operating in favor of busing. The court, because of its nature as a legalistic and moralistic decision-making body, is not very susceptible to or unresponsive to concrete policy information. That is what happens to the court's view that busing is good for education if in fact what is going on in the schools is that busing produces enormous tension, conflicts, and strikes. I mean, that would count as a disconfirmation of the court's thesis. Well, the court is not very good at weighing that sort of evidence. It typically doesn't come back next year and say, sorry, folks, we were wrong about the thesis. The court won't say: well, it turns out that there is no evidence that busing improves education and we're going to give up. They are left with the legal and moral argument. Equally they are left with the argument about racial harmony. They are not responsive to policy information on that either. Where it turns out that instead of improving racial harmony busing seems to have a very pervasive effect of destroying racial harmony or worsening it. If you do surveys of schools -- it turns out that racial attitudes, black attitudes toward whites and white attitudes toward blacks are typically more hostile after busing than before.

My point is that if you look at it as a policy analyst, which is what I am, you see a range of things that would be of concern about busing which would make you want to reconsider your promises and policies. You'd want to ask a whole range of empirical questions, but the courts aren't well equipped to do so.

With union strikes, it strikes me that the tendency for everyone to rush to judges to get teachers back in school and sanitation men back on the job, was pretty much doomed because the politicians would not follow through. You can't get around the fact that city government is a political process. Striking is essentially a political process. What happens when you go to the courts is that you get rather Draconian results, like the teacher's union chiefs get thrown in jail. They become martyred. If you remember the famous New York City transit strike, Mike Quill had the good fortune for his cause, not for him, of having a heart attack while in jail and therefore, he gained an enormous political victory by virtue of the fact that John Lindsay had gone to the courts. And after a long process in the courts it turned out that the courts ordered mediation, and the city wound up giving more in salary benefits than it would have, had Lindsay met Quill's demand on the first day of the strike. (That demand on the first day of the strike being termed "blackmail" by Lindsay.) Lindsay went on and eventually gave more money than in the "blackmailing" position.

But the second point is that where the politicians will not back up a court order on injunctions, the result is a legal and political farce. In state after state, you find the pattern that the city says to the union, if you don't go to work we're going to have to throw you in jail. Or they pass laws, like the Taylor law in New York which says that if you ever strike and you're a public service worker, we're going to fine you X million dollars a day and throw you in jail for contempt of court, something like that. In New York and elsewhere the union leaders would come out of jail, and be willing to bargain, having had their position strengthened. The first thing they would say to the city was, all right, we'll only make agreement if you promise that we will have amnesty or at least we won't be thrown in jail. Time after time what would happen at the end of these long debates was that the city would either overturn the existing legislation which required jailing or fines, or would simply ignore them. And that's that -- it becomes all sort of a mockery. The point is that you can't handle political debate through legal sanctions. It eventually becomes political debate again. I must say I'm at a loss to know exactly what the ideal method is for handling strikes. I suspect that one contribution the court has made is where they've enforced cooling off periods and forced arbitration, keeping people on the job.

It turns out I think it's easy to see, that the city is in a very weak position in dealing with union strikes whatever use is made of courts. For if a union goes on strike, who pays the costs? Well, first of all the city hall pays the costs because everybody says why can't you stop the strike. The public pays the costs because they don't get sanitation or educational services and therefore put more pressure on the city. The teachers or the policemen pay the costs to the extent that they don't have any strike funds. But I would suggest that the beauty of a strike is if you're a union leader, you place most of the cost of a strike on the city and on the public, particularly on the public. The public then gets angry at the city, and the city settles. Maybe you have an idea of what you would do about strikes. I don't. It's a tough one. And I think what's happened is that over time, with the depressed economy, unions have been economically in a weaker position, and it turned out that the only real weapon the city had was layoffs. All the other instruments, injunctions, laws prohibiting civil service strikes, all that, I think were pretty useless. The real weapon the city has is firing.

And indeed you might note, if this is the sort of thing that interests you, then that makes some sense in economic terms because the traditional argument against strikes in the public sector is that public sector employees are not subject to the same discipline as private sector employees. In the private sector you jack your wage up over a certain level that the company can't pay, the company is going to lose money - right? And what is the company going to do when it loses money? It's going to fire people. So there's a built-in equilibrium. The argument used by lawyers who argue against public service strikes is that there is no such equilibrium in the public sector. You can run your wages up forever without having any firing. That used to be the case. I'm not sure it's true any more.

The third area in which I think the courts have done poorly is in the area of criminal justice. The great hope in the sixties was that you could get a humane criminal justice system and police system by having the Supreme Court pass laws -- like they did in Miranda and Escobedo which gave defendants right of counsel and prohibited unlawful searches and seizures and so forth -- rights to counsel, regulations against the use of confession. I think the courts there were simply insensitive to the nature of police work as it takes place at the street level. If you've ever watched an arrest, it always surprises me how violent the process of getting a defendant under control can be. Sometimes you get six policemen trying to wrestle somebody to the ground. A single person can really do a lot of damage to six people. I always thought the Supreme Court had an ivory tower view of the matter which is often mimicked on television where the police on Barney Miller will say: If a guy has got a drawn pistol are you supposed to read the rights? This formalistic process of reading rights to someone as you're trying to wrestle him to the ground is naive. It's also naive to imagine I think that the courthouse procedure is going to be a model of justice, inasmuch as police and suspects typically have a long prim relationship. Most people who are arrested in cities have long records, they're known by the police. Research has shown that most people who are arrested think of it as sort of a game. They're probably guilty. Ninety percent of all people who are arrested are guilty of something. They may not be exactly guilty of the charge, and that's where the courts come in, but they're guilty of something and they know it. It's all sort of a game.

Well, the Supreme Court tried to enforce on this very kind of roughshod process of justice, criminal justice at the street level, a kind of Napoleonic code, and the result was that the policemen didn't follow it and the power of the policemen to continue to be brutal if he wants to is very great. You know, the policeman says to a defendant, if you tell anyone that I beat you up I will throw three other charges at you. What's the defendant going to do? If you're caught red-handed, and most people who are caught committing crimes are either caught running away from the scene or turned in by eyewitness. Kojak does not exist in real life, tracking people down through detective work. That's not how it happens. If you're caught red-handed what good does calling your lawyer do for you? Not much. You're far better off copping a plea and trying to get off with a reduced sentence, which is how our criminal justice system actually operates. My last point is that I'm not at all sure that the plea bargaining system that we presently have in our courts is an entirely bad one.

American constitutional law says that everyone is innocent until proven guilty. Everyone is supposed to have a fair and speedy trial. People are supposed to be represented by counsel. Well, that's the image, the constitutional image of court criminal justice. What's the truth?

The truth is that most people who are apprhended by policemen are guilty of something and they know it. Most parties to the arrest know that. Most of the offenses are what the judges and prosecutors call garbage offenses. They're petty ripoffs or domestic disputes, beating up one's wife or husband, more the former than the latter I guess. And they're not really major constitutional issues. The notion that the typical police case involves an innocent young kid who has not committed the rape or stolen from the candy store but who was suddenly swooped down upon by three New Haven police cars, beaten up, dragged off to jail, and sent to the Whalley Avenue prison where he languishes for three months without having a trial and then is sent to prison, is wrong. That just is not the case. The fact is that these tend to be people with records, these are people who in some cases really have committed unpleasant offenses.

What happens is that the system gets very cynical. There is tremendous incentive to people in the system to plea bargain -- incentive for the defense attorney because you get your client off with a reduced sentence -- incentive for the prosecutors because it saves time, if you can get a conviction why bother to really put a person against the wall -- incentive for the judges because they reduce the amount of business they have to do.

Now, I want to end with one thought. It is usually argued that the reason for plea bargaining is that the courts are overloaded, that the legal system can't handle the demands placed on it. Very good recent research shows that's just simply wrong, that regardless of case load, regardless of whether you're in a high case load or a low case load district, the lawyers and the judges all plea bargain. And they have come to do it because they have learned roles, and they learn roles which are cynical and which come to involve as one of the components the perception that all people are guilty. An interesting test you can make of young defense attorneys and young prosecutors is to ask them in their first year how many people they see coming before the courts whom they think are guilty. In the first year most people say twenty-five percent. The second year most people say fifty percent. By the time they've been around for three or four years they're up to ninety percent, which is --and as I said, not at all inaccurate.

Well, if that is true, you might want to reassess the tendency we all have to rail against the plea bargaining system because it's unAmerican, unconstitutional and illegal. It may be a crude and rough but perfectly sensible adaptation to a messy process. I think I've probably talked longer than I should have.

The U.S. Constitution and the Schools

Professor John G. Simon

My name is John Simon. I am a professor of law at Yale Law School. Our topic for the next few minutes, a little less than an hour, is the subject of the Supreme Court and the way it has handled questions of compulsory education and other matters relating to our educational system over the past few years.

I should start out by mentioning a few of the issues that don't relate to compulsory education, or at least that don't directly involve compulsory education, because I think that may serve as a useful introduction to the material on compulsory education itself and to some questions I want to put to all of you concerning compulsory education.

The issues that don't involve the direct question of whether or not we should require our youngsters to go to school relate to a great many topics touching on the management of the schools, racial integration matters, financing questions, student rights, teacher rights. Indeed, in the Supreme Court of the United States alone, in the period from 1950 to 1975, there were something like sixty-three cases (I don't have the figure before me) actually decided by the Supreme Court involving public and private -- mainly public -- education. That's in addition to the hundreds of cases the Supreme Court declined to hear. That figure of sixty-odd cases can be compared to the previous twenty-five year history of the United States Supreme Court, 1925-1950, when the Court decided exactly nine cases. I once took a look at how many cases the Supreme Court had decided in the first twenty-five years of its career (since this is the Bicentennial season when we look back at the beginnings of the Republic), and I found there were zero cases in the first twenty-five years. But that isn't a fair comparison, because we didn't have a free schooling system in most states, and we certainly didn't have compulsory education.

But the comparison of the period of 1925 to 1950 as compared to 1950 to 1975 is a striking one. The Supreme Court, and indeed the entire federal court system and to a lesser extent the state court systems, have recently been flooded with cases involving education. A great many of these cases, a very large number of them, have grown out of questions involving student rights. And I want to mention the student rights cases for a moment because they reflect one problem that is common to all the school cases -- a problem as to which people who teach in school and students who study in school can be of very great assistance to the court system as it tries to handle these cases. What I mean is this. As you look at the cases involving haircuts, involving student rights of expression, involving corporal punishment, involving disciplinary proceedings, involving publication of newspapers, involving the rights of students to participate in extracurricular activities (not all of these cases have reached the Supreme Court but many of them have), what they have in common is not so much a fight over constitutional doctrine -- although there have been a number of conflicts concerning the interpretation of the First Amendment and the Fourteenth Amendment and even the Ninth Amendment. I believe that what is more important than doctrine, in determining the outcome of this range of cases, has been the concept of schooling that the courts have in mind. What do they think the schools are for? Why do they think we have compulsory attendance systems? Why do they think we have a system of free schooling?

The competing models that the courts have in mind of what a school is for, or the competing goals they think schools are meant to serve, are crucial, perhaps the most important determinant of how these cases come out. And it's only by looking at these competing models or goals that you really begin to understand, if one ever does, why you get such different results or such different opinions from the different justices in these cases.

Let's take an example. There was a case called the Tinker case. It involved whether students could be required by a school system in Des Moines, Iowa, to take off the black arm bands they were wearing back in the late sixties to protest the war in Vietnam. The Supreme Court held that the First Amendment rights of the students had been violated by this arm band rule, and the school was, in effect, overruled in its attempt to make the students take off these arm bands.

The competing models are interesting. On the one hand, the majority of the Supreme Court, in an opinion by Mr. Justice Fortas (no longer on the Court), seemed to have in mind a model of the school as a marketplace of ideas, a kind of a junior version of the First Amendment utopia where opinions are freely exchanged and where there is a genuine competition of ideas. And the justices said there is no reason not to honor that model just because kids are involved. They saw that there were problems if the forum became too disruptive, and that learning could be impaired if things got out of hand, but this was the model -- the public forum; that's how they saw the school.

Then you take the dissent by the late Mr. Justice Black, who had followed a tradition of rigorous belief in the First Amendment and who was one of the most insistent exponents of the view that the First Amendment was not to be diluted and not to be modified in any way. When it came to this schooling case, however, he dissented, because his model of schools was quite different. That is, he did not see the First Amendment marketplace model as really applicable. He saw the school as a learning place, a relatively passive learning place. He wrote, "I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary...I deny [that this Court has held] that 'students' and 'teachers' take with them into the 'schoolhouse gate' constitutional rights to 'freedom of speech or expression'...Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public." This is Hugo Black talking! "The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the nation has outworn the old fashioned slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach."

Now, the same competition in models is, I think, revealed by another case involving student rights, and that's Goss vs. Lopez. Some of you may know about that. It was decided about a year and a half ago, and it involved the question of whether or not, before a student could be suspended for a period of one to ten days, any kind of a rudimentary form of notice and hearing had to be given to the student (except in emergency cases where the student had to be removed to avoid immediate violence). And the Supreme Court said, yes, you must give some notice and tell the student what the charge is even if the notice is oral and informal. It may have to be more formal if it's a longer suspension, but for this one-to-ten-day business, you must at least give the student notice and tell him what the charges are, and if he denies the charges then you've got to give him at least a rudimentary form of hearing even if the hearing is not before some impartial person. (It may be the person bringing the charges, like the principal.) You've got to give the student a chance to have some kind of hearing. The due process clause requires that procedure, said the Court.

It's a little hard to describe that model, but what the majority of the Supreme Court was following in Goss vs. Lopez was what you might call the criminal process model. It's not quite the same as the marketplace of ideas model; it's the model that you would certainly follow if, in an adult world, you were looking at any kind of attempt to punish, sanction or discipline anyone. And the idea here is that the school really has to live by that model. The school has to offer the full range of rights and fair processes that any other institution would have to follow in punishing adults.

Now, let's look at what the dissenters had as a vision of the schools. Mr. Justice Powell, dissenting in that case, had what is sometimes called the "Puritan governance" model. "Puritan governance" is the term some authors use to refer to the idea of the schools as a place where you inculcate respect for authority, respect for discipline, qualities of obedience. And that seemed to be Justice Powell's model. In the Goss case he wrote as follows: "Education in any meaningful sense includes the inculcation of understanding in each pupil of the necessity of rules and obedience thereto." (He even used the word "pupil." I haven't seen that used in a while.) "This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life...The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality; it provides an early understanding of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned."

Well, the difference in outcomes between the majority and the minority in this case and between the majority and the minority in the Tinker case, really is not so much a question of how they interpret the doctrinal nuances of the Fourteenth Amendment or the First Amendment, but rather a question of what they think the society has in mind when it sends children to school. And one reason why courts have trouble with this issue is that, as you well know, if one looks back over the history of education and of educational philosophy one gets so many different clues. If you go back to Aristotle, you read, at least in some of his writings, that education exists partly in order to make citizens feel a part of the state, a kind of a welding process, although at other points he talked about education as enabling people to profit from leisure. When you look at Thomas Jefferson's writings you read that the most important role of education, at least for the vast majority of citizens, is to teach them enough history so they can spot corrupt leaders. You take a look at somebody like Max Rafferty, the former Superintendent of Instruction of California, and you read that schools are important for teaching children about "the wonderful, sharp-edged, glittering sword of Patriotism." "I say that we had better thank God for the Army and Navy! And -- with half the world at our throats -- we had better teach our children that it is not a disgrace, but a priceless privilege to wear our country's uniform!" He said that we had better teach our children the "eternal verities"; "the results [of what we are doing] are plain for all to see: the worst of our youngsters growing up to become booted, side-burned duck-tailed unwashed, leather-jacketed Slobs, whose favorite sport is ravaging little girls and stomping polio victims to death...."

And so Max Rafferty had another set of ideas. I'm not putting him in the same league with Aristotle and Jefferson, but the point is that there are various clues, and the courts flop around, and they don't know whom to follow. And then, of course, there is John Dewey: At least an important part of John Dewey's educational philosophy had to do with helping children to adjust to life and to play their part as thoughtful citizens, and so, if you read Dewey, you come out with possibly a different model or set of goals. It's tough for the courts to sort all this out, and that's one reason why you get such different results.

That may also be why the Supreme Court has not come to grips with the most prolific set of cases that have come to the federal courts, but which the Supreme Court has not agreed to hear. I refer to the haircut cases. There are hundreds of these haircut cases. And you have to figure out whether you believe in the marketplace theory, or some other theory about schools, before you can say whether or not you really think that children who come to school should or should not be compelled to follow some particular norm with respect to wearing their hair. I have a student who did a map showing how the federal Circuit Courts have varied. You can see the stripes on some States, and the cross-hatching on others, showing the different ways that the Circuit Courts, the intermediate federal courts, have come out on the haircut cases. When you have that kind of "split in circuits," that's a classic situation in which the Supreme Court is supposed to hear the case. But it won't hear these cases. It hasn't heard one yet. It's been ten years now that it has refused to hear the haircut cases. And I think that's because they pose sharply this troublesome issue of what schools are for.

Now, let me move to compulsory attendance. This problem of what model you use, what model the Court looks at, arises dramatically -- although possibly in a more complicated fashion -- in the Yoder case. This is the case involving the Amish farming community in Wisconsin. The parents said that to send their children to school after the age of fourteen, after roughly the eighth grade, after the children had learned what the Amish parents thought was the basic necessities of the three R's, would be very damaging because, as they put it, it would prevent the parents from integrating their children into the way of life of the Amish faith; it would prevent the religious development of the Amish child -- the development of the non-worldly values that the Amish embrace. They felt that high school, as the Court paraphrased it, "tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. On the other hand, Amish society emphasizes [as part of its religious values], informal learning through doing, a life of 'goodness,' rather than a life of intellect, wisdom, rather than technical knowledge, community welfare rather than competition, and separation from rather than integration with contemporary worldly society." And the Amish said that therefore the values were in conflict, and that it would cripple their ability to sustain their own values if the children were caught up in the "worldly" values of a modern high school -- a competitive, materialistic, technical regime. And therefore the Amish went into court and asked that the compulsory attendance laws of the state of Wisconsin not apply. And they won.

The Supreme Court emphasized the religious nature of the Amish claims. The Court -- at least this Supreme Court -- would not have come out this way, I think, had there not been an important religious content to these claims.

But let me return to the models of education the Court had before it. On the one hand, the state of Wisconsin said that two principle goals are achieved by keeping kids in school: First, schooling helps the students to receive the necessary civic training (and they quote Jefferson), the necessary civic training to prepare citizens to participate effectively in our political system. Second, education prepares individuals to be self-reliant, self-sufficient participants in society. So we have, in a sense, the civic training model and the survival or career advancement model.

The parents came in with their own model -- a parental nurture model. All that schools are really for, they said, is to enable us to help us do what we think best for these children. After the eighth grade these schools are no longer doing what we think best. No longer are they our agents in carrying out our parental nurture, because they're doing something we don't want after that age, and therefore we don't want our children to go to those schools at those ages.

In choosing between these models the Supreme Court gave somewhat short shrift, I think, to the civic training model or to the career model, partly because of the way the Court characterized the question. Instead of saying, how much can two more years of education do for these kids, from fourteen to sixteen, in helping them to learn about the world and to take part in the world at large -- instead of that, the Court defined the question as whether these two years would assist "the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith." Well, once you define the problem that way and assume that that's where the kids are going and assume, as Justice White said in a separate opinion, that none of them want to become ballet dancers or jet pilots or Connecticut high school teachers, surely you come out with a rather different view. Because of the Court's constained notion of what the life of these kids would be, it engaged in a rather circular process. That's all their life is going to be, and why is it all? Because we're not going to expose them to other options. And why are we not going to expose them to other options? Because they do not need other options if all they're going to do is to go back to the agrarian farming community! That is a circularity I find fairly disturbing in the Yoder decision.

There are other problems. I think there is an inconsistency in the Supreme Court's notion about child development. When the Court is discussing how important it is for these kids to be turned back to their parents at the ages of fourteen and fifteen, it keeps referring, several times, to "the crucial years" of adolescence. Then, when the Court gets to the other side of the coin, asking what more could school do for these kids during these two years, at the age of fourteen or fifteen, then you don't hear about the "crucial" adolescent years any more. You hear about the fact that school is not going to do very much for them, that "there is at best a speculative gain, in terms of meeting the duties of citizenship, from one or two years of compulsory formal education," or there is only "a minimal difference between what the state would require [that's the extra two years], and what the Amish already accept...." No talk there about the "crucial" one or two years. Now they're "minimal" one or two years, "speculative" one or two years.

Let me just conclude, on this compulsory education issue, by talking about the issue as it may be framed in the future. There are people who may want to resist compulsory education but don't have a religious claim on which to base their resistance. Here's a fellow named Evashowsky. He's twelve years old and he lives in Willimantic. This is a year or two old, this clipping, or three or four years old. I don't know. I've had it in my file cabinet for some time; it's from the New Haven Register. He's twelve years old, and he doesn't want to go to school any more, and his father says his son is a "non-conformist" -- he compares him to Solzhenitsyn. The boy says he likes school, "but I just don't feel like going." They said, "If you don't go we'll come and get you. Well, I don't want to go." "He's free," said his father. "He's a smart son-of-a-gun. Three hundred years ago he would have said he was going to see what was on the other side of the mountain." Well, I don't know if this fellow went anywhere outside of Willimantic, but, in any event, the father said there had been pressure on the boy since he was five years old to attend school and that this pressure resulted from a system that would not tolerate non-conformity.

We have, then, a boy who doesn't want to go to school and claims he's got his own lifestyle and, I suppose, his own values. If some lawyer got hold of him and built up the case a little more, he could present an interesting claim. But it wouldn't be a religious claim. The question, at least one of the constitutional questions, would be posed this way: "Look, you said to the Amish that, as against their religious claim, their First Amendment, free-exercise-of-religion claim, the need for schooling wasn't all that clear -- schooling wasn't doing too much for those Amish children during those two years. All right, now here I am, Evashowsky [let's suppose he's fourteen now], and I have a claim. It's not a religious claim. It's a freedom claim. The Fourteenth Amendment says that no one shall be deprived of life, liberty or property without due process of law. Well, I'm being deprived of liberty if I have to go to school. That's a very powerful deprivation of liberty. There is nothing more powerful except for being sent to jail. (There's no draft any more.) And most people don't go to jail, but you're making everybody go to school. And that's a deprivation of liberty. Now, you have to justify that, and in the Yoder case, the Supreme Court said that not enough was accomplished in two years of high school to overcome the religious claim. How can those two years be a justification for overruling my liberty claim?"

Well, there's a certain logical force to that argument. But it's a loser in this Supreme Court. It's probably a loser in any Supreme Court that will likely be sitting for the next ten years at least. Chief Justice Burger went out of his way in his opinion in the Yoder case, the Amish case, to say that he didn't think that such a claim should apply -- he was, in effect, trying to head off Evashowsky at the pass. He wrote, "It cannot be over-emphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." In other words he says that once you're out of the religious area, don't count on the Yoder decision to help you. Sometime in the future the Court might take a different view. But I wouldn't hold my breath.

The courts are less likely than the legislatures to display some interest in modifying school leaving ages. A bill was introduced in Connecticut a few weeks ago -- I've been told that it's been withdrawn or it's not been reported out and that it's not going anywhere -- an act that would reduce the school leaving law from sixteen to fifteen if the student passes a proficiency test that shows he's performing at some basic skill level. California, which had a school leaving law of eighteen, has just reduced it to sixteen, starting last year, with a proficiency test requirement. A strong statement has been made by a prestigious group called the National Commission on the Reform of Secondary Education -- representing various educational perspectives -- which put out a book between hard covers that called on legislatures to lower the school leaving age to fourteen throughout the country for two reasons. One of the reasons brings us back to the Amish case -- I'm not sure it's a reason that has much substance to it -- but the Commission said, "If Amish children cannot be compelled to go to school, it is hard to see how others can be under a rule of law that promises equal treatment for all." That statement needs a lot of parsing, but, anyway, that's one argument. And the other Commission argument is a more functional one. "The liberation of youth and the many freedoms which the courts have given the students within the last decade make it impossible for the school to continue as a custodial institution and also to perform effectively as a teaching institution. The harm done to the school by the student who does not want to be there is measured not only by the incidents of vandalism and assault but also by a subtle and continuous degradation of the tone of the educational enterprise." So they're saying, let's get rid of our hard cases. I've talked to at least one of the principals in the New Haven system who, while he doesn't necessarily subscribe to the Commission's argument, says that there is a serious problem of trying to run a school while you've got a hard core of kids who desperately don't want to be there. And so that's one remedy: lower the age to fourteen whether or not the kids have a proficiency test, whether or not they can read or write. Let them out at fourteen.

And then within a few weeks or months of the Commission report, just to show you the contrast, another group of distinguished educators put out its book between hard covers. This was the Task Force on Secondary Schools in a Changing Society of the National Association of Secondary School Principals. And this report said, raise the school leaving law to eighteen throughout the country. We want to keep them in longer. We can do something for them. And again crime seems to be an important ingredient, as in the other report. The NASSP said that if we release these kids out into the outer world with nothing for them to do there's going to be, "a void of apathy, delinquency, wasted talent and public indifference." It's better that we do something with these kids and keep them either in school or in some alternative settings that we find for them -- but, in either event, school should serve as the compulsory management institution for these children until the age of eighteen.

This conflict is rather interesting, and the last thing I wanted to say --

I meant to stop at five so we can throw the floor open a little bit -- but the last thing I wanted to say is that by coincidence you have somebody before you who is supposed to be spending a lot of time thinking about this problem of school leaving ages and compulsory education. At Yale Law School we received a grant last summer from the Foundation for Child Development to study, on a multi-disciplinary basis, the problem of school leaving laws, the whole problem of compulsory education in relation to age. And obviously it's a project that doesn't only involve lawyers (although we have a lot of law students working on the task right now); we are also working with the Psychology Department (in relation to cognitive development and affective and social development) and with the people from the Sociology Department (in relation to socialization and age stratification) and the Economics Department (in relation to the income and labor market effects of leaving school earlier or later). We are also trying to study the question of goals -- this whole problem of what school is for -- and to go back to some of the early compulsory attendance statutes and get a little better idea of what the legislative history tells us, and, specifically, what the history tells us about why people thought the kids ought to be in school until sixteen instead of fourteen or instead of eighteen.

And we're trying to study the question of what difference it makes: Suppose we change the school leaving laws. Who would stay in? Who would leave? Would it make much difference? Are the National Commission people correct when they say you get rid of the hard cases? Claude Brown, in his book Manchild in the Promised Land, wrote about his youth in Harlem and said that he and his friends liked to come to school because it was warm in the winter. All kinds of people have all kinds of reasons for coming to school even if not compelled. It's a place of socialization, it's a place of peers, perhaps it's a place to get some drugs or to meet girls or boys, or whatever. And so it's unclear to us what would happen if you changed the law, except that in the long run -- no matter what happens in the short run -- it may make some difference if the society officially declares, through formal statutory amendments, that it doesn't care if you go to school after a certain age. In the long run that decision may enter into the cultural norms of the country. We're trying to figure out this question of impact both on a short run and a long run basis.

It's a rough project. It's complicated because you have to try and look at everything at once and do it fairly quickly and without an enormous budget. But it's interesting.

My plea at the end of all this is addressed to all of you who are in education and who are dealing with the very kids we want to know more about (we're going to be talking to kids too). We hope you'll help us out by phone call or letter to the Yale Law School. Or come around and see me. We're trying to get more input on many topics, including your view of what the schools are doing that really makes a difference. There may be some things we're missing, important things we're missing, that may make a difference in how one appraises the effectiveness of schooling during what the Supreme Court called the "crucial" or "minimal" one or two years at age 14-16. Those years may be very important in ways that we don't even begin to understand. And so we would welcome ideas, relating to effectiveness of schools or educational goals or alternative programs -- ways in which one can provide work or public service options during those adolescent years without lowering the school leaving law.

Or simply ideas about what you think the effect of all this would be. You are closer to youngsters in schools than we are over at the Law School. Our "youngsters" there are twenty-two, three, or four, and I asked them about their high school experience, but they can't clearly recall what happened to them eight or nine years ago. And so I would like to hear more about what you think would happen if the laws were changed. In the last analysis, the judges and the legislators, and those of us who study these things for judges or legislators, in the last anaylsis we'll have to get some of our answers to these questions -- questions about goals and about effectiveness and impact -- from the people who have dedicated their lives to our children, and that's who you are.

Freedom of Expression in American Constitutional Law

Professor Thomas I. Emerson

Ladies and gentlemen, I assume you are all generally familiar with the field of freedom of expression, and I won't undertake a broad survey of that area. Rather, I will spend my time talking about some of the recent trends and developments which might be of interest to you and might afford the basis for studies in this field.

First of all, with respect to the basic theory that underlies the system of freedom of expression in the United States. It seems to me difficult to overestimate the importance of teaching the underlying principles upon which our system of freedom of expression rests. The reason for that is that the system as it exists in the United States, or as it would exist anywhere, is essentially a very sophisticated kind of system. The natural inclination of anybody, whether in a government position or not, is to either not listen to or restrict or put in jail anyone who offers a differing opinion. And a readiness to develop ideas and attitudes and principles of law and practices which encourage controversy, encourage dissent, not at the level of violent action but at the level of speech, is not an easy thing to inculcate in a society. It seems to me that it is extremely important that our students at the earliest possible age begin to grasp some of these ideas that underlie our theory of freedom of expression.

Let me just say a few more words about that. I have elsewhere attempted to analyze the functions which freedom of expression plays in a democratic society, and I won't attempt to state those in any great detail. But let me just summarize what seem to me the basic ideas. The first function that the system performs is one of allowing personal fulfillment, allowing the individual to express himself, to create, to develop his or her own personality. The second is John Stuart Mill's idea of the search for truth, that one arrives at the truth only by examining all opinions, hearing all different points of view; even if the opinion is false it is of social importance because it makes us defend our own position and makes us understand our own position. We do not now put that in terms of searching for "the truth," but we do put it in terms of searching to advance knowledge or make decisions and so forth. The third is the use of expression for public decision-making, and here the theory of Dr. Alexander Micklejohn plays an essential role. His view of the Constitution, and the accepted view of the Constitution, is that the people of the country are the sovereigns, the government is the servant, and the people as masters have the right to tell the government what to do. That being so, it is essential that the people hear all ideas, opinions, information, facts; the government has no power to suppress or influence the content of such expression. And the fourth function is that a system of freedom of expression facilitates a satisfactory balance between social change in the society, which is absolutely necessary, and stability, which is also necessary for a successful society. By talking over ideas, arguing them out in advance, one can sort of test them out, through discussion rather than through trial and error, and one can make decisions through the medium of talking and deciding and voting rather than through the use of violence. So the proper balance between change and stability depends a good deal on a successful system of freedom of expression.

Now, these ideas, so far as I know have remained essentially unchanged over the years. There is just one development, which I call to your attention, that is quite interesting. In the past most of the emphasis has been put upon the social or the utilitarian functions of freedom of expression, the last three that I mentioned, and less emphasis upon the first. But within the last few years there has been a growing interest in the use of freedom of expression as a means for personal fulfillment, as a device for expression of one's own individual creativity. The development of the counter-culture has trended in that direction.

Now, this trend does not find any expression in the Supreme Court decisions. The Supreme Court as a whole has not pushed in that direction. There is, however, one exception, and that is Justice Douglas. Justice Douglas has moved further and further in this area as you will see from his concurring opinion in Roe vs. Wade, the abortion decision. I simply call your attention to that as a trend that may be of interest.

Next, so far as a development of doctrine is concerned, there are no signs in recent decisions of the Supreme Court that the Justices have been able to agree upon any unified doctrine for applying the First Amendment to the various situations in which it arises. There have always been a series of tests that the Court has from time to time used, or that have been advocated by others, to measure the area in which speech will be allowed and the point at which the government is entitled under the First Amendment, if any, to cut off speech. I am talking now about cases in which the concern of the government is with the effect of speech, where the government restriction or regulation undertakes to deal directly with a prohibition or a serious restriction upon speech, such as in the sedition cases, the Smith Act cases, and so forth.

The Court originally started with what might be called the bad tendency test. Then for a while the Court adopted the clear and present danger test as the test for limits, a test which focused on the effect of speech, whether it was creating a clear and present danger of an evil that the government had a right to prevent. Another suggestion was one advanced particularly by Judge Learned Hand, that the test should be one of incitement -- speech that incited to violent or illegal action could be prohibited. That test focused on the content of the speech, what kind of speech it was, rather than on its effect.

A fourth test has been the balancing test, in which the Court attempts to balance the interests in favor of freedom of speech against the interests that the government is seeking to protect. And the fifth test is the absolute test, which involves undertaking a definition of what is speech or what is expression and then giving full protection to that speech, saying that the government cannot control it under any circumstances. If the government wants to achieve certain objectives it has to do it by controlling the action rather than the speech; the speech itself is not subject to any form of restriction.

What has happened in this area in the last few years is this: First of all, the only Justices who supported the absolute theory of first defining speech and then saying it was entitled to full protection where Justices Black and Douglas. Both of these have now left the Court, so there is no representative of that point of view any longer remaining on the Court.

Secondly, the Court seems to have settled within the last few years upon a test which sort of combines elements of the clear and present danger test and of the incitement test. This point of view was first expressed in Brandenburg vs. Ohio, decided in 1969. The formula is that expression can only be restricted if it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As you see, this test includes an element or a focus on the effect, likely to produce imminent lawless action, and also on the content, inciting imminent lawless action. The Court now seems to have settled on this formula for prescribing the extent to which speech can be restricted insofar as the law is dealing directly with speech.

In other areas, such as for instance loyalty cases or the extent to which a legislative committee may investigate in the speech area and so on, the Court tends to use the balancing test. It attempts to balance the interests, both individual and social interests in freedom of expression, against the interests of the government in whatever it is trying to do, secure employees that will be loyal, secure information, or so forth.

Now, to move from those general areas of basic theory and major doctrine to more specific areas, let me first discuss the national security and internal order problems. This is the traditional area in which First Amendment cases first began to arise shortly after or about the time of World War I, and in which most of the famous decisions have taken place. It involves questions relating to sedition laws, the Smith Act, the registration of the Communist Party under the Internal Security Act, qualifications for admission to the bar or for getting a passport, loyalty cases, legislative committee cases, the whole question of attempting to secure national security or internal order against the possible impact of speech. This is still a very lively area. It raises dramatic and important problems and ones which would arouse a good deal of interest, I think, in any class discussion.

There have been no really new developments here, with one very major exception, an exception that creates a number of rather dramatic issues. That exception concerns the operations of the intelligence agencies, FBI, CIA, Army Intelligence, and so forth. Recently we have seen the scope of those activities, ranging from simple surveillance of political activities or political associations of people to wiretapping and bugging, the use of informers, infiltrators and provacateurs, illegal break-ins, illegal opening of mail, the COINTEL program, the attempt to discredit Martin Luther King, and other actions of that sort. Police conduct of this nature raises a very significant problem in our society or in any society. How do you control the secret police? And to what extent can the government simply keep track of the lawful activities of its citizens? The actions of the police have a tremendous effect upon freedom to speak and to dissent.

Now, the Supreme Court has not dealt very extensively with this problem. But it has decided one major case which is absolutely basic. That case is United States vs. United States District Court, decided in 1972, involving wiretapping and the Fourth Amendment but with very clear implications for the First Amendment also. The Nixon administration had claimed that the Fourth Amendment protection against unreasonable searches and seizures did not apply, and the wiretapping statute which required court warrants in order to tap under limited circumstances did not apply, where the executive branch was attempting to investigate national security problems. The government thus attempted to establish a main exception to most of our constitutional liberties, namely, that they could be infringed or the rules changed if there were serious danger, or if the executive branch thought there was serious danger, to the national security. The Supreme Court rejected that position and held that the national security element did not justify departure from constitutional rights. That was absolutely basic. If the decision had gone the other way there would not have been much left of our constitutional system.

Beyond this, the courts have not developed this area very much. In Laird vs. Tatum in 1972 the Supreme Court refused to consider the validity of the Army Intelligence Program, which involved widespread surveillance of citizens. In the Richardson case in 1974 it refused to order the disclosure of the CIA budget, in spite of the fact that the Constitution expressly provides that there shall be an accounting of receipts and expenditures. The Supreme Court has not cut down the government's power to put infiltrators into organizations, or to entrap people, and so on. So that in these rather specific areas the Supreme Court has not gone very far.

Here, however, not only court decisions but legislation becomes quite important. The reports of the Church committee and the Pike committee, and the proposals of Attorney General Levi for guidelines for the FBI, furnish some very important materials that throw a lot of light on this particular subject.

Another area which has tended to develop recently involves the problem of access to the media of communication. This has always been a problem and probably will be a problem in any society, but it has grown increasingly more significant recently, both with respect to newspapers and with respect to radio and TV. By and large the mass media of communication are in the hands of a relatively small group that represents a particular economic, social and political point of view. The result is distortion of the system and the inability of many points of view to get themselves heard. There has been a great deal of discussion recently about what might be done about that problem. I don't have time to go into details, but what the Supreme Court has done is roughly this: As to the newspapers, the Court has held that there is no right of access to the columns of a newspaper. In Miami Herald vs. Tornillo a Florida statute provided that if a newspaper attacked a candidate for political office it must publish a reply by that candidate. The Court struck down the statute on the ground that it was an interference with the freedom of the press. Thus it is clear that the Court is not going to allow any access to the printed press.

The situation with respect to radio and TV is different. Here there are limited facilities and the government has an obligation to parcel out those facilities on some basis. For this reason the Supreme Court has moved somewhat further in the direction of allowing greater access and more diversity in radio and TV. In the Red Lion case in 1969 the Court upheld the fairness doctrine. But in the Democratic National Committee case in 1974 it upheld the refusal of the FCC to order broadcasting stations to put on paid political spot announcements. So the Court has drawn the line at that point. Nevertheless it has left open the question of whether or not FCC regulations or a statute could provide that sort of access.

The coming of cable TV will change this situation a good deal, because it will provide many more channels for electronic communication. The development of this new means of communication in a way that will allow much greater freedom of expression, and diversity of expression, is one of the most important questions that the country faces today.

I can only mention briefly several other problems that have been the cause of discussion or court decision. A lot has been written and reported about the free press-fair trial question, the extent to which a defendant in a trial, a criminal proceeding, may be prejudiced by press publicity before the trial so that it becomes impossible for him to get a fair jury or to get a fair trial. Within the last five years there has been an increasing number of so-called gag orders, court orders restricting the press on what they can print about criminal trials. This issue is before the Supreme Court right now. It was argued several weeks ago in the Nebraska Press Association case and we can expect a decision in this month or next month. It is a very interesting question.

Another area of concern relates to the question of "the right to know" and government secrecy. There has been a great deal of argument that the First Amendment guarantees a right to know, a right of people to receive information and to obtain information for the purpose of communicating it to others. The Supreme Court has recognized this right as one included in the First Amendment, but has not done very much to implement it. It is a rather difficult area to implement.

The major issues have revolved around government secrecy and the disclosure of government information. Clearly it is crucial in any democracy that citizens know what the government is doing; but this obviously raises some difficult questions, particularly in the field of foreign affairs. The issues have arisen around two points: One is whether the government should be compelled to produce information rather than withhold it through a classification system or something of that sort. Second is the problem of what to do about information that leaks out of the government, over the objection of the government. The Pentagon Papers case raised this second issue. Also the Ellsberg case raised the question of whether a government employee was subject to criminal liability for releasing information. And S.1, the present bill pending to revise the Federal Criminal Code, goes very far in establishing a sort of official secrets act which would penalize government employees, reporters, publishers, or anyone who disclosed information the government claimed should be secret. All these are major issues that I think require public discussion.

The other things I'll just mention in a word. There has been an interesting development in the area of the rights of persons who are in institutions. This includes not only government employees, their rights to engage in politics or to express themselves within the government agency, but also persons who are confined to prisons, mental hospitals, or are in the military forces. What the rights of, for instance, prisoners should be, their rights to freedom of religion, their rights to freedom of speech, their rights to a fair hearing before they get put in solitary, and so forth, is a very interesting area that is developing quite rapidly and is worth some attention.

Finally there is the area of government support for the system of freedom of expression, that is, affirmative government action to make the system work better. The major recent case in this area is Buckley vs. Valleo, decided last March, in which the Supreme Court upheld provisions of the Federal Election Campaign Act which provided public subsidies for political candidates in the presidential election. This, it will be noted, is a method of using public moneys to increase the amount of expression, even though the expression may be directed against the administration itself. That is also an important development.

I will stop now except to say one thing. That concerns the obtaining of materials through which these issues can be raised in a class setting. Clearly the cases decided by the Supreme Court or by other courts constitute a ready source of materials. They present the issues in a dramatic way. They present specific issues from which you can branch out into broader and more philosophical discussions. They represent decisions of courts, so that the heat is taken off anyone for taking any particular position; you are in a position of criticizing or talking about a court decision. There are other advantages. So these decisions seem to me to remain a primary source of materials.

I call your attention to the fact that there are now other materials available also. Legislative reports such as the report of the Church Committee that investigated the CIA and the FBI, the Pike Committee, some of the Watergate material, and other reports of that kind can be obtained. There is also proposed legislation. This material includes Attorney General Levi's proposals to control the FBI, the S.1 legislation to reform the Federal Criminal Code, and so forth. All these raise many interesting problems in a very specific way, a very current way, and a very lively way. I think they would be quite useful.

Looking at Constitutions

Professor Leon S. Lipson

I am aware that this after-dinner speech comes long after dinner, and it is my task to make those of you who left sorry that you left (laughter), and the rest of you forget the heat. It's been a long day for you of elocution, allocution, and circumlocution. You may have learned more about the United States Constitution than you care to know. I gather you have also learned a little bit about other constitutions. Your tolerance for information on still a third constitution, the constitution of the Union of Soviet Socialist Republics, on which as Bruce told you I spent some of my teaching time, is probably lower still. What I hope to impart tonight is not more information, lest your cup run over, but a hint or two on the perspective. The specific angle of vision will be comparative; and my hope is, not that I shall succeed in telling you what you did not know, but that I shall persuade you or remind you to reflect otherwise than before (not necessarily in agreement with me) on what you already knew.

From that angle I should like to take a look with you at the myth of constitutionalism, the relationship between validity and wisdom, the two forms of the institutional fallacy, and some connections among substance, procedure and machinery. Other important pertinent topics will have to be omitted, and even in the selected domain we can probe only a little way down.

First, on the myth of constitutionalism. If we have a public religion in the United States it is the religion of constitutionalism, I think: not Christianity, not freedom, not capitalism, not equality, not even democracy -- though all of those high words are linked somehow with one another and with constitutionalism. If that assertion strikes you as lawyers' braggadocio, consider the form that public utterances, even utterances of non-lawyers, are likely to take not only on formal occasions but also and above all on those occasions when the speaker is hard-pressed, under attack, and has to appeal for justification to the strongest bonds that he can find to fasten on those whom he wishes to persuade. And it seems to me that the chief dogma of the religion of American constitutionalism is not separation of powers, or life, liberty & property, or (to take the better known variant from the Declaration of Independence) life, liberty & the pursuit of happiness, or due process, or checks and balances, or judicaial review: but E Pluribus Unum, out of many, one; unity out of diversity, Unity _in_ diversity.

That appeal invokes our history, using the term "our" by generous inclusive fiction to embrace many whose forebears were at the relevant times not here, or here but excluded from the polity. That appeal invokes our history by recalling the concrescence of many settlements into a more or less coherent nation, the union of several states into a coalition and a confederation and a federation, the triumphant exapnsion, annexation and absorption of territory, the long and bloody struggle waged for all sorts of reasons by all sorts of people that preserved the Union against secession, the partial differential integration (if I may be allowed to mash a couple of mathematical terms) of the new waves of immigrants who came in the century that stretched between the potato famine in Ireland and the final solution in Auschwitz.

Beyond history the appeal to constitutionalism is intended to make legitimate the insistence on the respect that any current majority owes to current diversity by implying confidence in the ability of the country to flourish on disagreement, by giving assurance that the marketplace of ideas is regulated within an adequately restrained but also adequately restraining political and legal frame, by promoting that sense of security on the strength of which we are better able to tolerate ambiguity, temporary failures of fit or closure, and the shocks of rapid change.

So great is the deference that we pay to our Constitution, so great is the energy that we devote to patrolling its borders, that we often run the risk of trying to make constitutionalism do what it can't do without costly strain. Of the hazards as well as the accomplishments of judicial activism you will have heard something in today's seminars. What here deserves emphasis even at the price of repetition is the danger of confounding the criterion of constitutional validity with the criterion of political wisdom. That confusion can go in either direction. In one direction the evaluator, judge, advocate, citizen, declares a measure or action to be unconstitutional out of a conviction that it is an unwise measure or action. In the other direction the evaluator (who, in this variant, for obvious reasons is less likely to be in the position of judge) declares a measure or action to be wise because it has been held or is safely to be deemed constitutionally valid.

Another way to put the lesson that such confusion ignores is to say that what a constitution can do, whether it's a constitution with an upper-case C or a lower-case C, is to constitute, that is, to make basic arrangements, which are expected to last quite a while till some basic rearrangement is made. What a constitution cannot do is serve as a sufficient guide through all of the great and perplexing public problems of the day. Neither can the legal system as a whole.

If, for example, we should have to agree that the power of the president to commit armed forces to combat without a congressional declaration has now been firmly established by a hundred and fifty years of practice, it does not follow that that is a good way to run a war. If we accept the constitutional validity of a scheme laid down by a state legislature to regulate decisions on the performing of abortions, it does not follow that we ought to approve it as a good measure. In other words, the constitutional challenges are not the only challenges that must be met. And this caution can of course hold in reverse. That which is unconstitutional is not necessarily unwise. Therefore the possibility of amendment of the constitution; and, one wing of legal realism would add here, therefore also the possibility of justices sometimes switching their votes.

About the Soviet system I shan't say more at this time than that the Constitution, with an upper-case C, is not a very potent myth among those myths by which the Soviet Union sustains itself. A good illustration, which is briefer and milder than many I could cite, is afforded by the experience of one Soviet citizen active in the movement for civil rights who a few years ago was called in by the KGB, the committee for state security, successor to the NKVD and other notorious initials, for a pre-arrest chat. The KGB interrogator warned him that he was risking prosecution and severe punishment for his persistence in seditious activity. The Soviet activist replied that in publicly defending certain other activists he was only exercising his legal rights, that the activists on whose behalf he was working had merely demonstrated in a lawful and open way, and that their right to demonstrate, like his right to defend their right, was assured by Article 125 of the Soviet Constitution. And at that point the KGB interrogator retorted almost sadly, please, we're having a serious conversation. (laughter)

Now, turning to the institutional fallacy. When we make comparisons across place and across time, our natural tendency toward cognative rationalization, that is, our tendency to want to make sense of what we see, often tempts us into either a negative or an affirmative institutional fallacy. Let me try to explain that. Suppose we are starting with the better-known and proceeding thence to the less well-known, the natural way of comparing. The better-known, let's say, is system A; the less well-known, system B. And suppose our relationship to the systems is such that we can find directly the names and functions of the institutions of system A, but for B can learn directly only the names of the institutions but not their functions. Now, suppose we notice that system A has, but B does not have, institution X. It is often tempting to infer that the function that is performed in A by X -- call it function F -- is not performed in B at all because B has no X. The conclusion may be true, but no thanks to our inference. We are missing a necessary premise, namely that function F can be performed only by institution X. If that premise were supplied, the inference would be valid; but my very point is that the premise is untrue.

On the other hand, if we observe that something called institution Y exists both in A and in B, and in A institution Y performs function G, then we are often tempted to suppose G is done also in B and by Y. The missing premise here is, "If Y can do G in A, then Y can do G in B."

Moving out of letters to facts, I am saying that we commit the institutional fallacy in its affirmative form when, for example, we infer from the existence of the Supreme Court of the USSR that certain important functions that in the United States are performed by the Supreme Court are performed in the USSR by the Supreme Court, or at all. We know how the reviewing powers of the Supreme Court of the United States are limited by certain crucial situations; why should we suppose that the limits are located at the same place in another system? We should commit the institutional fallacy in its negative form if we inferred from the absence of genuinely contested elections in the Soviet Union that the governed play no part whatever in the choice of the governors; or if we inferred from the absence of a private capital market in the Soviet Union the absence of economic inequality and privilege. (It is in the Soviet Union after all that income on the side, whether in the form of "perks" or that of black-market profits, is most highly developed. And it is in the Soviet Union that one popular form of curse, at least according to folklore, is the curse, "May you be condemned to live on your salary." (laughter)

Now I'd like to turn to another methodological warning about what I call the tilt. It's a related danger that lurks to deceive the drawer of comparisons. A tilt is likely to occur when we compare two systems about which we hold opinions under strong emotional or ideological influence. Suppose we hold a high opinion of A and a low one of B, and we seek to compare similar subsystems for A and B. We tilt if we contrapose an ideal description of system S-sub-A with a real description of system S-sub-B. And we tilt in the direction of our prejudices, that is, in favor of A and against B, because the real is almost always inferior to the ideal; so that we have made A look relatively too good or B look relatively too bad.

Thus, if we compare the Anglo-American trial by jury as it is justly celebrated in Law Day oration with the Soviet criminal trial as it is accurately reported by dissident emigres, we have titlted the comparanda to suit our invidium, just as we tilt in the other direction when we compare the proclamations in Soviet laws about the right of work with America statistics on United States unemployment figures.

The proper way is to compare myth with myth, opinion with opinion, fact with fact, or, if we're interested in a different aspect of political and social psychology, to compare myth with fact in one place and at one time, then to compare myth with fact in another place or at another time, and then to compare the comparisons. We then may safely conclude that, say, the gap between doctrine and reality is wider in A than in B, or wider now in A than it used to be in A for one or another sub-system.

The Soviet Constitution of 1936, which is the one that is still basically as much in force as it ever was, contains some sterling provisions. Under that banner many have fallen, including (as some here may recall) the chief draftsman of that very constitution. From most standpoints that most of us would consider important, the text of the constitution has not been greatly altered in forty years, but practice under the constitution has improved significantly though not radically. Thus, the improvement in the law in action has outstripped the improvement in law in the books. We should be able to understand this and acknowledge it without losing sight of the fact that even the present gap between the ought and the is, between the pretense and the fact, between the desire and the performance, is still very wide. I do not know of any serious outside observer, for instance, who believe that Soviet judges are, as the constitution lays it down that they are, independent and subject only to the laws, though some outside observers do believe that the dependence of Soviet judges on political direction now is more often generic than specific to particular litigation.

Again, a basic Soviet statute with quasi-constitutional status says that criminal sentence is not to be imposed in any way other than by sentence of a court. That law, enacted around 1960, was a considerable advance in law on the books. Yet it did not prevent the authorities from sending quite large numbers of people to exile and forced labor in Siberia for up to five years as parasites on sentence passed, not by a court, but by neighborhood public meetings (confirmed by local town councils), under cover of the explanation that the anti-parasite law was outside the criminal code and conviction for parasitism was not a criminal conviction.

If I had to sum up these broad and sketchy remarks, I should say that I have been urging you first to acknowledge the force but not necessarily the cogency of the noble American myth of constitutionalism; second, to recognize and resist the temptation to draw certain kinds of invalid inference while not denying that the conclusions may be true even though they are reached through invalid process; third, to keep clean and straight the lenses of comparative observation. While it is not the end of wisdom, it must be a good start, to learn to clear one's mind of cant. And that takes me back to the Soviet Union, which has a highly favorable export balance in cant. (laughter)

One of the Soviet dissidents who keep insisting that Soviet officials should be required to respect the Soviet Constitution, a man who I believe is still in a prison camp for that insistence, said a little while ago that the freedom that is guaranteed in words by the Soviet Constitution must be interpreted as freedom to oppose the government in power because, he said, freedom to *support* the government wouldn't need the protection of a constitutional guaranty. And we may adapt that to our point here.

The cant of which we ought to be specially careful to clear our minds is not the cant which it is anyhow in our selfish interest to detect and repudiate. The cant that we have to be careful about is the cant that comforts us, that flatters our vanity and lulls our sloth and confirms our prejudices. To think clearly is perhaps no very lofty ideal; I am reminded of the title of a book of essays on analytic philosophy called *Clarity is not Enough*. Well, I agree that an exhortation to free the mind of cant does not make the pulse beat faster. Yet there are many purposes, and I hope you will agree that in these remarks I have suggested some of them, for which one may still prefer good prose to bad poetry.